BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

TDS METROCOM, LLC,

Complainant,

vs.

Docket No. 6720-TI-175

WISCONSIN BELL, INC.
d/b/a AMERITECH WISCONSIN,

Respondent.

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TELECOMMUNICATIONS DIVISON

COMPLAINT

TDS Metrocom, LLC ("TDS Metrocom"), by its attorneys, and pursuant to Chapter 196 of the Wisconsin Statutes, and § PSC 2.11, Wis. Admin. Code, files this Complaint against Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin, for violation of Wisconsin Statutes, including, Wis. Stat. §§ 196.03, 196.219, and 196.37 through Ameritech Wisconsin's unjust, unreasonable, unconscionable and anti-competitive penalties under its tariffs.

PARTIES

1. Complainant, TDS Metrocom, is a Delaware limited liability company duly authorized by the Public Service Commission of Wisconsin ("Commission") as an alternative telecommunications utility to provide intrastate telecommunications service in Wisconsin, including competitive local exchange services.

2. Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin ("Ameritech Wisconsin" or "Ameritech"), is a corporation organized and formed under the laws of the state of Wisconsin, maintaining its headquarters at 722 North Broadway, Milwaukee, Wisconsin 53202-4396. Ameritech Wisconsin is a subsidiary of Ameritech Corporation, a Delaware corporation with its corporate headquarters located in Chicago, Illinois. SBC Communications Inc. ("SBC") acquired Ameritech Corporation on or about October 8, 1999. Ameritech Corporation is a wholly owned subsidiary of SBC. SBC is a foreign corporation which maintains its headquarters in San Antonio, Texas. Ameritech is a "Bell Operating Company" ("BOC") as that term is defined by Section 3(35) of the Telecommunications Act of 1996 ("Act")[1] (47 U.S.C. § 153(35)) and Ameritech Wisconsin is an incumbent local exchange carrier ("ILEC") in Wisconsin as defined by Section 251(h) of the Act (47 U.S.C. § 251(h)). Ameritech Wisconsin provides local services, intraLATA service and other services within Wisconsin. Within its operating territory, Ameritech Wisconsin has been the incumbent local exchange provider of telephone exchange services at all relevant times.

JURISDICTION

3. The Commission has authority under the Wisconsin Statutes to resolve this Complaint. Under Wis. Stat. § 196.02(1), the Commission has jurisdiction "to supervise and regulate every public utility in this state and to do all

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, *et seq.*) (the "Act").

things necessary and convenient to its jurisdiction." *See* Wis. Stat. § 196.02(1). Moreover, under Wis. Stat. § 196.03, the Commission must ensure that public utilities do not charge unjust or unreasonable fees for telecommunications services. In determining whether a charge is unjust or unreasonable, the Commission must analyze *at least* the following factors: Promotion and preservation of competition, consumer choice, promotion of economic development, and the promotion of efficiency and productivity. *See* Wis. Stat. § 196.03(6).

4. The Commission further is authorized to hear and resolve this Complaint under Wis. Stat. §§ 196.219, 196.26, 196.28, and 196.37.

5. Wis. Stat. § 196.219 authorizes the Commission to take action to ensure that telecommunications providers do not "[i]mpair the speed, quality or efficiency of services, products, or facilities offered to a consumer under a tariff, contract, or price list." By enacting Wis. Stat. § 196.219, the legislature expressly granted the PSC the authority to protect the consuming public, including CLECs, and to foster competition. *See* Wis. Stat. § 196.219; *see also* Wis. Stat. § 133.01.

6. Wis. Stat. § 196.26 authorizes the Commission to hold hearings on and resolve complaints that "any rate . . . charge . . . act or practice relating to the provision of . . . telecommunications service is unreasonable, inadequate, unjustly discriminatory or cannot be obtained." *See* Wis. Stat. § 196.26(1)(a).

7. Wis. Stat. § 196.28 provides that whenever the Commission "believes that any rate or charge is unreasonable" or that "an investigation of any

matter relating to any public utility . . . should for any reason be made . . ." it may investigate a matter summarily. *See* Wis. Stat. § 196.28(1).

8. Wis. Stat. § 196.37 provides that if the Commission determines a rate or charge is unreasonable or unjust, it shall determine and order reasonable rates or charges. *See* Wis. Stat. § 196.37(1).

9. The Commission has jurisdiction under all of the above listed statutes to resolve this Complaint against Ameritech.

BACKGROUND

10. Ameritech provides telephone service to residential and business customers pursuant to tariffs, which describe and limit the amount of money Ameritech may charge those customers for its services.

11. Under P.S.C. of W. 20, Part 4, Section 2, Ameritech is obligated to provide service to business customers at specific charges. In the absence of any other specific discount tariffs, Ameritech is obligated to provide service to businesses under this tariff.

12. Ameritech provides discounted service to business customers under P.S.C. of W. 20, Part 9, Section 3-- its "ValueLink" tariffs (including ValueLink which begins on sheet 13; ValueLink Plus which begins on sheet 14; Enhanced ValueLink Plus which begins on sheet 24; and Stand Alone Toll Retention Plan which begins on sheet 31) (hereinafter sometimes referred to as ValueLink tariffs).

13. Pursuant to its ValueLink tariffs, Ameritech discounts its rates to business customers. The level of a customer's discount depends upon various factors, such as minimum bills, minimum levels of usage, and duration.

14. In order for a customer to receive any discount from Ameritech under its ValueLink tariffs, the customer must sign an exclusive, long-term contract with Ameritech. The length of the contracts generally range from 12 months to 36 months.

15. Ameritech also provides discounted service to business customers under P.S.C. of W.20, Part 2, Section 8-- its "CompleteLink" tariffs.

16. Pursuant to its CompleteLink tariffs, Ameritech discounts its rates to business customers. The level of a customer's discount depends upon various factors, such as minimum bills, minimum levels of usage, and duration.

17. In order for a customer to receive any discount from Ameritech under its CompleteLink tariffs, the customer must sign an exclusive, long-term contract with Ameritech. The length of the contracts generally range from twelve months to thirty-six months.

18. Once a customer signs Ameritech's long-term contract, it is forced to continue receiving services from Ameritech for the entire contract period, or it will be subject to large termination charges imposed upon it by Ameritech if it switches to a competitive provider.

19. In most cases, the termination charges imposed by Ameritech exceed the "discounts" received by the customer under Ameritech's long-term contract.

In fact, if the customer terminates its contract with Ameritech early in the contract period, it will have received a small discount, but must pay penalties several times the amount it received as a discount. For example, assume that a business customer has a 36-month contract with Ameritech under Ameritech's ValueLink Plan. If the customer received a 10% monthly discount on a service that otherwise would cost $1,000.00, its monthly savings is $100.00. If the customer terminates its contract with Ameritech after 8 months, it will have received an $800.00 discount. Its termination penalty, however, would be $24,000.00-- 30 times greater than the customer's discount. Even if the customer received a 30% discount, it still would pay termination penalties ten times higher than the discount it receives.

20. The ValueLink and CompleteLink termination charges bear no relationship to any reasonable actual, damage Ameritech could assert.

21. Ameritech's tariffs, in pertinent part, provide:

> (a) <u>Ameritech ValueLink</u>
> Customers who terminate their 18 or 36 month contract before the expiration date of the contract will be billed termination liability of a lump sum equal to the full monthly fixed rate times the number of months remaining on the contract.
>
> (b) <u>Ameritech ValueLink Plus</u>
> Customers who terminate their plan before the expiration date of the contract will be billed termination liability of a lump sum equal to the Minimum Monthly Usage Commitment rate times the number of months remaining on the contract.

(c) Enhanced Ameritech ValueLink Plus
Customers who terminate their 12-, 24-, or 36-month plans before the expiration date of the contract will be billed a termination liability which consists of a lump sum equal to 50% of the MAUC [Minimum Annual Usage Commitment] times the number of years or fraction thereof, remaining on the contract.

(d) Ameritech Stand Alone Toll Retention Offer
Customers who terminate their plan prior to the expiration of the period will be subject to a termination liability. The termination liability will consist of a lump sum equal to the MARC [Minimal Annual Revenue Commitment] prorated by the number of months remaining in the contract.

(e) Ameritech's CompleteLink contract as required by its CompleteLink tariff, provides for a termination penalty equal to 50% of the minimum annual revenue commitment multiplied by the remaining years on the agreement.

22. Ameritech's ValueLink and CompleteLink termination charges are unjust and unreasonable and are prohibited for the following reasons:

(a) The charges are anti-competitive and excessive;

(b) The charges are unconscionable; and,

(c) The charges are illegal penalty charges.

23. Not only do the termination charges violate Wis. Stat. §§ 196.03, 196.219, 196.26, and 196.37, they also unjustly enrich Ameritech and preclude competitors from competing with Ameritech, thereby hindering the development of competition in Wisconsin's local exchange market, stifling economic development, and obstructing the development of telecommunications infrastructure.

24. Absent its ValueLink and CompleteLink tariffs, Ameritech still legally would be bound to provide services to its business customers under P.S.C. of W. 20, Part 4, Section 2. Therefore, to the extent that Ameritech suffers damages when a customer switches providers, Ameritech may recover no more than the difference between what the customer would have paid under P.S.C. of W. 20, Part 4, Section 2 and what the customer paid under the discount rate (under P.S.C. of W. 20, Part 9, Section 3 or P.S.C. of W. 20, Part 2, Section 8).

25. This Commission recently concluded that long-term contracts are not in the public interest when there is insufficient competition. (*See* Final Decision, *Application of Mid Plains, Inc. for Approval of an Alternative Regulation Plan*, Docket No. 3650-TI-107, June 28, 2002) ("it is not in the public interest to encourage Mid-Plains to enter into long term-contracts if competitive choices are expected to develop. Locking customers into long-term contracts may erect a barrier to competitors entering the market.") (Final Decision, pp. 9-10).

26. The Illinois Commerce Commission ("ICC") also recently concluded that Ameritech's ValueLink termination charges were unjust, unreasonable, and anti-competitive. (*See Association of Communication Enterprises f/k/a Telecommunications Resellers Association v. Ameritech Illinois*, Docket No. 00-0024, January 3, 2002) ("*Illinois Order*"). The ICC ordered Ameritech, in pertinent part, to "revise the tariffed calling plans...to provide for termination charges calculated by subtracting the discounted charges the customer actually incurred during its term of service from the charges the customer should

have incurred, based on its actual term of service... (*Illinois Order*, at 36). A true and correct copy of the *Illinois Order* is attached as Exhibit 1. This Commission similarly should order Ameritech Wisconsin to eliminate or, in the alternative, modify its termination charges under both its ValueLink and CompleteLink tariffs, as applicable, regardless of whether the termination penalty is 100% or 50% of the remaining minimum commitment.

I. AMERITECH'S VALUELINK AND COMPLETELINK TARIFFS ARE ANTI-COMPETITIVE AND EXCESSIVE.

27. Ameritech's termination charges under its ValueLink and CompleteLink tariffs, which drastically exceed the amount the customer saves by "discount," are unjust and unreasonable because they are anti-competitive and excessive and violate Wis. Stat. §§ 196.03(1), (6), 196.219, and 196.37.

28. Wis. Stat. § 196.03(1) states that charges by public utilities for telecommunications services "shall be reasonable and just and every unjust or unreasonable charge for such service is prohibited and declared unlawful."

29. In determining a reasonably adequate or just charge for telecommunications service, the Commission must consider the promotion and preservation of competition and the promotion of consumer choice. (*See* Wis. Stat. § 196.03(6)). Further, Wis. Stat. § 196.219(3)(c) requires the Commission to ensure that telecommunications providers do not "[i]mpair the speed, quality or efficiency of services, products, or facilities offered to a consumer under a tariff, contract, or price list." Wis. Stat. § 196.37(1) provides that if the Commission

finds a rate or charge to be unjust or unreasonable, it "shall determine and order reasonable rates...[or] charges to be imposed, observed and followed in the future."

30. Ameritech's ValueLink and CompleteLink tariffs are unjust and unreasonable because they are anti-competitive. The termination charges greatly exceed any supposed discount a customer receives and lock customers into long-term contracts without a reasonable opportunity to switch providers. The only way for the customers to switch to a new provider is to pay these large termination charges. Many customers cannot afford to pay Ameritech's large termination charges, so they are forced to remain with Ameritech, the monopoly provider. The result is that Ameritech captures and retains an involuntary customer base at the expense of its competitors and Wisconsin consumers.

31. This Commission recently declared that long-term contracts such as those imposed by the ValueLink and CompleteLink tariffs erect barriers to competition and are not in the public interest. (*See Application of Mid Plains, Inc.*, Docket No. 3650-TI-107, *supra.*) ("Locking customers into long-term contracts may erect a barrier to competitors entering the market.").

32. Additionally, in holding that Ameritech's ValueLink termination charges were unreasonable, the ICC recently stated, "a termination penalty is unreasonable if its primary effect is to lock customers away from competitive advances during the transition to a competitive market, rather than to protect the involved carrier against economic damages from the specific agreement." (*Illinois*

Order at 16). Like Ameritech Wisconsin's ValueLink and CompleteLink tariffs, the ICC concluded that "both the intention and primary effect of [Ameritech Illinois'] ValueLink termination penalties has been to lock customers away from emerging competition. The sheer size of the potential penalty for terminating a ValueLink agreement makes it likely that customer lock-in will be its primary effect." (*Id.*) The ICC further reasoned:

> It is self-evident that when a customer has a long-term agreement with a service provider, and when that agreement is enforced by a large termination penalty, the customer cannot participate in a competitive marketplace. The marketplace ramifications of such customer control are especially broad when the pertinent service provider recently enjoyed a state-protected monopoly and still retains most of the available customers. Alternative providers cannot hope to survive--and the benefits of competition cannot be distributed--unless customers are free to choose their carriers.

(*Id.*)

33. Ameritech's ValueLink and CompleteLink tariffs also are unjust and unreasonable because they are excessive. If a customer switches providers, Ameritech charges the customer the full amount of money it otherwise would have received under the contract had the customer not switched providers. Unless the customer switches providers a month or two before the contract expires, the financial cost to the customer is severe and exponentially will exceed the "discounts" it receives under Ameritech's tariffs. As the example above demonstrates, the penalty a customer faces could be 30 times greater than the

discount it receives and, of course, also 30 times greater than any additional amount Ameritech could have received under its own tariffs. Such a severe financial penalty is excessive.

34. Moreover, Ameritech will receive a windfall because it will receive compensation under the ValueLink and CompleteLink tariffs for a service it never provided. The customer is forced to pay Ameritech for a service it never received. Ameritech's collection of money for services never rendered clearly is unjust and unreasonable.

35. Finally, the service Ameritech provides under its ValueLink and CompleteLink contracts already are tariffed under P.S.C. of W. 20, Part 4, Section 2. Ameritech cannot reasonably claim damages in an amount higher than what the customer would have paid under the P.S.C. of W. 20, Part 4, Section 2, tariff rate and what the customer paid under the ValueLink and CompleteLink discount rate. Any damage amount in excess of the difference between the tariff rate and the discount rate is unreasonable and excessive.

36. The ICC determined that Ameritech's practice of charging the full contract amount was unreasonable and excessive:

> When a termination penalty for telecommunications service consists of the full minimum revenue contemplated by the agreement, it inherently exceeds actual damages. Whatever Ameritech's actual damages may be when a ValueLink agreement is terminated, it is something less than expected revenue, since the subject services cost something to provide.

(*Illinois Order*, at 17).

37. Because Ameritech's ValueLink and CompleteLink tariffs are anti-competitive and excessive, they are unjust and unreasonable and, therefore, should be prohibited.

II. AMERITECH'S VALUELINK AND COMPLETELINK TARIFFS ARE UNCONSCIONABLE.

38. Ameritech's ValueLink and CompleteLink tariffs also are unjust and unreasonable under Wis. Stat. §§ 196.03, 196.219, and 196.37 because they are unconscionable.[2] If a customer chooses to switch telecommunications providers before the end of its contract period with Ameritech, the financial penalty it suffers is much greater than the customer's discount.

39. Ameritech's termination charges are unconscionable because Ameritech's customers lack meaningful choices when accepting the Ameritech contract, which unreasonably favors Ameritech.

40. Realizing that it soon could face competition, Ameritech created many of its ValueLink and CompleteLink tariffs either before its competitors entered Wisconsin's local telecommunications marketplace or before its competitors gained a strong foothold in the marketplace. For example, Ameritech adopted the Ameritech ValueLink and the Ameritech ValueLink Plus tariffs on April 1, 1996. It adopted the Stand Alone Toll Retention Offer on June 25, 1999,

[2] The Commission may look to contract law for guidance in determining whether Ameritech's tariffs are unjust or unreasonable under the state's public utility laws. *See e.g., Investigation of the Issues Relating to Resale and Sharing of Wide Area Telecommunications Service (WATS) and Message Telecommunications Service (MTS)*, 1983 PUC Wisc. LEXIS 49, *4 (Commission looked to case law for guidance in determining definition of "public offering."); *see also Illinois Order*, at 19.

and the Enhanced Ameritech ValueLink Plus tariff on May 28, 2001. The absence or nascent state of competition provided customers no meaningful choice other than to accept Ameritech's tariff.

41. The tariff terms and resulting contracts unreasonably favor Ameritech. The amounts Ameritech collects under the termination clause far exceed the amounts saved by customers, and exceed Ameritech's actual costs of losing the customer.

42. There also is a gross inequality in the bargaining position between customers and Ameritech. Ameritech has benefited from years of government sponsored monopoly status. Ameritech is able to dictate the terms and conditions of its services to all of its customers. Often, as with the disputed ValueLink and CompleteLink tariffs, the resulting contracts are skewed and one-sided in favor of Ameritech.

43. Ameritech's ValueLink and CompleteLink tariffs are unconscionable and, therefore, unjust and unreasonable under Wisconsin's public utility laws.

III. AMERITECH'S VALUELINK AND COMPLETELINK TARIFFS ARE PENALTY DAMAGES.

44. Ameritech's termination charges also are unjust and unreasonable under Wis. Stat. §§ 196.03, 196.219, and 196.37 because they constitute illegal stipulated damages. To be enforceable, stipulated damage clauses must be reasonable. Ameritech's termination charges are unreasonable.

45. Ameritech's termination charges do not reasonably forecast the harm caused to Ameritech by customers who switch providers.

46. Ameritech's termination charges also are unreasonable because they grossly exaggerate the actual harm Ameritech sustains by losing a customer.

47. Further, at the contract's inception, Ameritech is capable of accurately estimating the costs it will incur if a customer switches providers. Ameritech's termination charges do not meet the requirements necessary to be enforceable liquidated damages.

48. Therefore, since the termination charges are illegal penalty charges, they must be eliminated.

49. The ICC also held that Ameritech's termination charges delivered an excessive amount of revenue to Ameritech. The ICC reasoned that if a customer switched providers early into its contract, Ameritech would enjoy "a windfall recovery of the cost of providing years of undelivered services." (*Illinois Order*, at 25). If the customer switched providers near the end of its contract with Ameritech, "Ameritech's recovery is smaller, but it always includes costs that Ameritech will not actually incur and, therefore, includes profits that exceed both gross and net.... A liquidation provision that simply demands payment of anticipated revenues, without regard for avoidable expenses, is not just and reasonable." (*Illinois Order*, at 25).

50. Ameritech's termination charges are illegal stipulated damages and, therefore, are unreasonable and unjust under Wisconsin's public utility laws.

IV. AMERITECH'S VALUELINK AND COMPLETELINK TERMINATION CHARGES UNJUSTLY ENRICH AMERITECH.

51. Ameritech's ValueLink and CompleteLink tariffs also unjustly enrich Ameritech. When a customer switches to another provider and pays Ameritech's large penalty fees, Ameritech receives an amount in excess of its actual costs of losing that customer. In other words, because Ameritech receives the same amount of money without having to provide service, it is left in a better financial position after the customer's switch than if the customer had completed the contract.

52. Moreover, Ameritech already is obligated to provide service to business customers under P.S.C. of W. 20, Part 4, Section 2, which lists the costs Ameritech can recover for such service. The only way Ameritech can avoid being unjustly enriched is to ensure that it recovers no more than the difference between the existing tariff rate (under Part 4, Section 2) and the discount rate (under the ValueLink and CompleteLink tariffs).

53. In ruling on this issue in Illinois, the ICC also held that Ameritech relied on its termination charges for illicit purposes: "Because Ameritech thus uses a variety of schemes for determining its termination penalties, even for plans including the same services, it is unlikely that all – or perhaps any – of those penalties have been designed to recover actual damages...the underlying 'reason' for the magnitude of the ValueLink termination penalties is not the recovery of

actual damages, but the delay of effective competition." (*Illinois Order*, at 17-18).

54. Thus, not only are Ameritech's termination charges unjust and unreasonable, they also unjustly enrich Ameritech.

PRAYER FOR RELIEF

For the foregoing reasons, TDS Metrocom, LLC, respectfully requests that:

1. The Commission issue an order:

    a. Finding that Ameritech's termination charges under its P.S.C. of W. 20 tariff, Part 9, Section 3 are unjust and unreasonable;

    b. Finding that Ameritech's termination charges under its P.S.C. of W. 20 tariff, Part 9, Section 3 illegally inhibit competition in Wisconsin's local telecommunications marketplace;

    c. Prohibiting the P.S.C. of W. tariff, Part 9, Section 3—termination charges; or, in the alternative, ordering Ameritech to modify its P.S.C. of W. 20 tariff, Part 9, Section 3—termination charges so as to collect only the difference between the discount the customer received and the amount the customer would have paid under P.S.C. of W. 20, Part 4, Section 2;

    d. Requiring that Ameritech shall refund charges to all customers that were assessed termination charges under the P.S.C. of W. 20 tariff, Part 9, Section 3.

2. The Commission issue an order:

    a. Finding that Ameritech's termination charges under its P.S.C. of W. 20 tariff, Part 2, Section 8 are unjust and unreasonable;

    b. Finding that Ameritech's termination charges under its P.S.C. of W. 20 tariff, Part 2, Section 8 illegally inhibit competition in Wisconsin's local telecommunications marketplace;

c. Prohibiting the P.S.C. of W.20 tariff, Part 2, Section 8 termination charges; or, in the alternative, ordering Ameritech to modify its P.S.C. of W. 20 tariff, Part 2, Section 8 termination charges so as to collect only the difference between the discount the customer received and the amount the customer would have paid under P.S.C. of W. 20 tariff, Part 4, Section 2;

d. Requiring that Ameritech shall refund all charges to all customers that were assessed termination charges under the P.S.C. of W. 20 tariff, Part 2, Section 8.

3. In the absence of an expedited resolution in its favor, TDS Metrocom, LLC, requests an expedited hearing to resolve this dispute and that the Ameritech P.S.C. of W. 20 tariff, Part 9, Section 3 and P.S.C. of W. 20 tariff, Part 2, Section 8—termination charges be suspended pending the resolution of such hearing.

4. TDS Metrocom, LLC, requests that the Commission suspend the Ameritech P.S.C. of W. 20 tariff, Part 9, Section 3 and P.S.C. of W. 20 tariff, Part 2, Section 8—termination charges, and investigate Ameritech's P.S.C. of W. 20 tariff, Part 9, Section 3—termination charges, pursuant to Wis. Stat. §§ 196.03, 196.219, 196.28, and 196.37.

5. TDS Metrocom, LLC, requests that the Commission award TDS Metrocom, LLC, its reasonable attorney's fees incurred in prosecuting its Complaint.

6. In the alternative, the disputed tariffs must be suspended pending Ameritech's compliance with the proper notice and filing requirements, and any

subsequent challenge to the tariffs under Wis. Stat. §§ 196.03, 196.219, 196.28, and 196.37.

7. TDS Metrocom further requests that the Commission open an investigation of Ameritech's termination penalties generally, under Wis. Stat. § 196.28 and require Ameritech to disclose, and as necessary, modify any additional tariffs where Ameritech charges similar unreasonable termination penalties, and that Ameritech be required to disclose, and if necessary, modify any other contracts under which Ameritech charges similar unreasonable termination penalties.

8. For such other and further relief as the Commission deems appropriate.

Dated this 23rd day of August, 2002.

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Association of Communication	:	
Enterprises f/k/a Telecommunications	:	
Resellers Association	:	
-vs-	:	
Ameritech Illinois, Inc.	:	
	:	00-0024
Complaint against enforcement of unjust	:	
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service and for modification of Value-Link	:	
tariffs and contracts.	:	

ORDER

January 3, 2002

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	:	**00-0024**
Complaint against enforcement of unjust and anti-competitive termination penalties in tariffs and contracts for Value-Link service and for modification of Value-Link tariffs and contracts.	:	

ORDER

By the Commission:

I. PROCEDURAL HISTORY

On January 11, 2000, the Association of Communication Enterprises ("ASCENT" or "Complainant"), f/k/a Telecommunications Resellers Association, filed a complaint pursuant to Sections 9-250 and 10-108 of the Public Utilities Act ("the Act"), 220 ILCS 5/9-250 and 5/10-108, alleging that Ameritech Illinois ("Ameritech" or "Respondent") has included unjust, unreasonable and anti-competitive early termination charges in service contracts entered into pursuant to tariffs collectively referred to as the "ValueLink tariffs[1]." ASCENT additionally charges that the ValueLink tariffs and associated contracts[2] contravene the prohibitions against anti-competitive action set forth in Section 13-514 of the Act (220 ILCS §5/13-514). ASCENT also contends that the ValueLink tariffs impose barriers to competition in violation of Section 253 of the federal Telecommunications Act of 1996 (47 U.S.C. §253). Further, ASCENT alleges that the subject early termination charges are so exorbitant that ValueLink contracts are unconscionable under Illinois law and the Restatement (Second) of Contracts, Section 208 ("Restatement 208").

[1] The specific Ameritech tariffs subject to this complaint pertain to the service packages entitled ValueLink Illinois, ValueLink Extra, ValueLink Extra Select, ValueLink Illinois-Option F, ValueLink Illinois-Option F Preferred, Enhanced Ameritech Value Link Plus, CompleteLink, and StraightRate.
[2] Although the ValueLink services are tariffed, Ameritech requires customers to sign "a service agreement acknowledging that the customer has ordered the plan." Ameritech Ex. 1.0 at 17. In this Order, such agreements are referred to as the "ValueLink contracts."

ASCENT requests that the Commission require Ameritech to: rewrite its existing and future ValueLink tariffs and contracts to eliminate all termination charges that include minimum usage or revenue commitments for services found not to be competitive under Section 13-502 of the Act (220 ILCS §5/13-502); reduce the termination penalties to a reasonable level for all ValueLink tariffs containing volume or revenue commitments for services found to be competitive under the Act; prohibit Ameritech from charging a termination penalty when it cannot produce a valid contract; prohibit Ameritech from imposing a termination penalty on a Competitive Local Exchange Carrier ("CLEC") when it wins back a customer who received service under a ValueLink tariff assigned to that CLEC; and grant such other relief as the Commission finds just and reasonable.

Pursuant to notice given in accordance with the rules and regulations of the Commission, hearings were held in this matter before a duly authorized Adminstrative Law Judge ("ALJ") of the Commission at its offices in Chicago, Illinois on February 16 and July 11, 2000. Complainant was represented by counsel and presented the testimony of William A. Capraro, Jr. Ameritech was represented by counsel and presented the testimony of Thomas M. Wilson. Staff was represented by counsel and presented the testimony of A. Olusanjo Omoniyi and Robert F. Koch of its Telecommunications Division. Petitions to Intervene were filed by the Illinois Attorney General's Office and by U.S. Buying Group, Inc. Both petitions were granted without objection; however, neither Intervenor was active in the proceeding. At the conclusion of the hearing on July 11, 2000, the record was marked "Heard and Taken."

Both parties and Staff filed Initial and Reply Briefs and the arguments made therein are fully considered in this Order.

An ALJ's Proposed Order was served on the parties on July 25, 2001. ASCENT, Ameritech and Staff each filed both a Brief on Exceptions ("BOE") and a Reply Brief on Exceptions.

II. COMPLAINANT'S POSITION

Mr. Capraro is the Chief Executive Officer of CIMCO, a CLEC and member of ASCENT. He testifies that ASCENT is a national industry association formed to foster and promote telecommunications resale and to protect and further the interests of entities providing such services. ASCENT represents more than 800 entities, has more than 30 Illinois-based members, and many more certificated to provide competitive local exchange services in Illinois.

He states that until recently, Ameritech provided automatic volume discounts that allowed its business customers to obtain lower usage rates if they selected more Ameritech services, but did not require customers to commit to usage levels or prescribed lengths of service. With the advent of competition, however, Ameritech eliminated the discounts and encouraged customers to obtain service under its

ValueLink tariffs on a "take-or-pay" basis. Under these tariffs, a customer chooses a minimum level of usage or revenue and is charged the minimum amount, regardless of whether it meets the minimum commitment. Mr. Capraro asserts that the tariffs are anti-competitive because their large early termination penalties (the customer's entire minimum commitment) effectively lock in a significant portion of the market prior to the emergence of competition, thus enabling Ameritech to maintain its monopoly. More specifically, he identifies four anti-competitive attributes of the ValueLink tariffs.

First, Mr. Capraro maintains that the charges imposed for early termination are extraordinarily high because they require payment of an amount several times larger than the customer's potential savings under the tariffs. This occurs, according to Mr. Capraro, because the customer's minimum commitment includes both competitive and noncompetitive services. For illustration, he cites the ValueLink Extra tariff, under which a customer who makes an annual commitment of $25,000 for three years receives a 6% discount on qualifying competitive services. A customer fulfilling half of its annual commitment with noncompetitive services would enjoy a discount of $750 per year or $2,250 over the life of the contract. However, if that customer requested early termination, it would be required to pay the remaining annual commitment of $25,000 through the end of the contract period. Mr. Capraro avers that the disparity between the benefit provided by the contract and the charge for early termination is not just and reasonable.

Mr. Capraro maintains that the unreasonableness of the ValueLink early termination charges is further demonstrated by a comparison with the penalties Ameritech imposes when customers "are in a position to demand reasonable terms and conditions." For example, when an Ameritech customer is approached by another carrier to switch from Ameritech, or when a customer is already being served by another provider, Ameritech offers "win-back" tariffs, which provide discounts for taking Ameritech services for a specified period. The termination charges under the Winback Term Plan and the Business Special Rate III tariffs are only $200.

Similarly, for services that Mr. Capraro characterizes as "truly competitive," such as Ameritech's ISDN Prime Service and Dedicated Communication Service, the early termination charges are the difference between what the customer has actually paid and what it would have paid if it had agreed to a shorter term. The customer is not liable for any future time period covered by the contracts for those services.

Second, Mr. Capraro asserts that by eliminating volume discounts for non-competitive services and "luring" customers to replace those discounts with ValueLink tariffs, Ameritech abuses its monopoly power. He acknowledges that Ameritech has recently designated virtually all of its services competitive. However, he emphasizes that the Commission is reviewing some of those designations in Docket 98-0860 to determine whether they should have remained noncompetitive at the time Ameritech signed customers to the ValueLink tariffs. If the Commission determines that the reclassified services should have at all times been designated noncompetitive, Ameritech will have locked in customers to long term contracts prior to the time those customers would have had competitive alternatives.

Third, Mr. Capraro testifies that the ValueLink tariffs are applied anti-competitively because Ameritech imposes a termination charge even in the absence of a contract. He states that, in some instances, neither Ameritech nor the customer could produce a document demonstrating that a customer subscribed to a particular service. In other instances, he charges that signatures were either forged or made by persons unauthorized to bind customers. Moreover, Mr. Capraro states, Ameritech will advise CLECs that a ValueLink customer is "contractually bound" to Ameritech although no written agreement exists. In his view, this discourages competitors from pursuing such customers.

Fourth, Mr. Capraro avers that while Ameritech will permit a CLEC to assume a customer's ValueLink contract on a resale basis, it nonetheless imposes termination charges on the CLEC if that customer later leaves the CLEC for another carrier. This occurs even when the customer returns to Ameritech. Furthermore, he emphasizes that Ameritech controls the provision of service when a CLEC assumes a contract. Therefore, when a customer opts out of a contract because of poor service, Ameritech profits both by regaining the customer and by imposition of the termination charge.

In sum, Mr. Capraro insists that Ameritech harms customers by locking them into long-term commitments under the ValueLink tariffs. "Contract terms that may have appeared favorable...prior to effective competition, may now be entirely uncompetitive in light of the continually declining price structure and innovative service offerings resulting from the emerging competitive market." Additionally, he charges that the ValueLink tariffs have a "significant anticompetitive impact on CLECs" because customers in the small to medium size commercial market cannot afford to absorb the termination charges associated with switching carriers.

ASCENT also claims that Ameritech's termination charges are unconscionable under the standard set forth in Ahern v. Knecht, 202 Ill. App. 3d 709; 563 N.E. 2d 787 (1990); 150 Ill. Dec. 660 (2nd Dist. 1990), which states: 1.) "A contract may be treated as unconscionable when it is improvident, oppressive or totally one-sided;" and 2.) "Factors relevant to finding a contract unconscionable include gross disparity in the values exchanged or gross inequality in the bargaining positions of the parties together with terms unreasonably favorable to the stronger party." Complainant further cited the Restatement 208, which states that a court may refuse to enforce a contract, or enforce it without the unconscionable term, or limit the unconscionable term so as to avoid an unconscionable result. Complainant additionally argues that the Restatement (Second) of Contracts §356 ("Restatement 356") prohibits a party from setting unreasonably large penalties for breach of an agreement. Complainant cites Saunders v. Michigan Avenue National Bank, 278 Ill. App. 3d 307 (1996), which held that a contract clause requiring unreasonably large liquidated damages is unenforceable as a violation of public policy. Complainant contends that the discrepancy between benefit and cost in a ValueLink contract is sufficiently great to meet this judicial standard for an unconscionable contract.

As a remedy, ASCENT seeks to reduce what it believes to be unfair termination charges to a just and reasonable level or to eliminate them entirely from the ValueLink tariffs. Complainant also requests that such charges be imposed by Ameritech, if at all, in a way that does not impair competition, but enables formerly bound customers to elect competitive alternatives. Mr. Capraro suggests that a just and reasonable termination charge for competitive services would be the difference between the discount rate received by the customer for signing a ValueLink contract and the price the customer would have paid if it had not signed such a contract. For non-competitive services, no termination charge would be allowed.

ASCENT does not seek to eliminate termination charges imposed by CLECs. Mr. Capraro claims that a CLEC customer has, by definition, had an opportunity to exercise competitive choice and, accordingly, can be appropriately locked in with termination penalties. In contrast, he argues, ValueLink customers locked up by Ameritech have never experienced true competition, because they were induced to accept long-term agreements after the elimination of volume usage discounts. He opines that Ameritech's termination charges would be justified only if its market share was equal to that of the CLECs or if the CLECs had a significantly larger share. He was unsure, however, what percentage of market share would justify high termination charges for Ameritech.

Mr. Capraro acknowledges ASCENT members, including his own firm, use termination charges to lock up customers. However, he avers that Ameritech has a service advantage that makes it easy to win customers back. He concurs, though, that ASCENT members use termination charges to prevent customers from switching to other CLECs.

ASCENT argues that the relief it seeks is consistent with the prior Commission Order in Dockets 94-0096, 94-0196 and 94-0301 (Consolidated) (April 7, 1995). In those cases, the Commission rejected a proposal that Ameritech customers with long-term contracts be granted a "fresh look" that would in effect invalidate those contracts. ASCENT indicates that it is not asking that the contracts at issue be invalidated, but rather requests that the Commission provide relief against the most inequitable aspects of the contracts. ASCENT elaborates that Ameritech has included services in the minimum revenue commitments needed to obtain some ValueLink discounts that ASCENT believes will be found to be noncompetitive by the Commission in Docket No. 98-0860. ASCENT indicates that since the ValueLink discounts replaced the automatic volume discounts which did not require term commitments, disallowing the termination charges would leave Ameritech no worse off than when it granted the automatic discounts. Furthermore, ASCENT states that if Ameritech imposed the more reasonable ISDN Prime Service and Dedicated Communication Service charges recommended by ASCENT, customers would have to forfeit their savings upon early termination of their contract. ASCENT asserts that this position directly addresses Ameritech's argument that customers who receive the benefit of discounts should be bound for the full term of the contract.

ASCENT further argues that its requested relief is consistent with the Commission's Order in Dockets 95-0135 and 95-0179 (Consolidated) (October 16, 1995). ASCENT notes that the Commission ruled that locking in customers contractually obstructs the Commission's policy of creating a customer choice environment through presubscription, and is a barrier to competition. ASCENT argues that by including noncompetitive services in the revenue commitments in some of its ValueLink tariffs, Ameritech has acted contrary to the Commission's policy set forth in Dockets 95-0135 and 95-0179. ASCENT states that if the Commission finds in Docket 98-0680 that some of Ameritech's business services were noncompetitive at the time that Ameritech signed customers to ValueLink contracts, those customers would have been locked in to long-term contracts prior to the availability of competitive alternatives.

ASCENT further notes that the Commission allowed a "fresh look" provision for local interconnection in Docket 92-0398. ASCENT indicates that the Commission adopted a provision that allowed any LEC customer with a long-term access arrangement in excess of three years to terminate the arrangement without paying a charge.

ASCENT also contends that Ameritech ignores the record in this matter in asserting that ASCENT failed to prove that the termination charges do not bear a reasonable relationship to the damages resulting from early termination. ASCENT notes that Ameritech has filed revised tariffs reducing the termination charges by 50% on its ValueLink plans. ASCENT states that in addition to the revenues received from the reduced termination charges, Ameritech would also receive revenues from resale or unbundled elements purchased by the new provider of the customer who terminated the agreement early. ASCENT states that this level of net income far exceeds any income that Ameritech could have received if the customer had retained Ameritech's service during the full term of the contract and, therefore, is excessive under both contract law and public utility law. ASCENT also argues that Ameritech should not be allowed to avoid review of its tariffs by modifying them in the middle of a complaint proceeding.

ASCENT objects to Ameritech's position that the Commission defer a decision on the legality of Ameritech's termination penalties until after a generic rulemaking proceeding applicable to all telecommunications carriers addresses termination penalties. ASCENT asserts that the evidence in this proceeding matter establishes that Ameritech's termination charges are unenforceable under contract law and unjust and unreasonable under public utility law. ASCENT concludes that the Commission's ruling should be based on that evidence alone.

III. AMERITECH'S POSITION

Mr. Wilson is Executive Director, Business Core Services Product Marketing, for SBC Communications. He testified that, to his knowledge, the Commission has never rejected termination charges based upon payment of the minimum commitment for the balance of a contract term in either Interexchange Carrier ("IXC"), CLEC or Incumbent Local Exchange Carrier ("ILEC") tariffs. He testified that, contrary to locking up customers, Ameritech's business customers purchase only approximately 13.4% of their service under the calling plans at issue in this matter. Furthermore, he notes that Ameritech permits all of the calling plans to be assigned to a CLEC. Ameritech cited Stride v. 120 West Madison Building Corp., 132 Ill. App. 3d 601, 477 N.E. 2d 1318 (1st Dist. 1985) in support of its assertion that locking in customers is improper. Ameritech argues that ASCENT admitted that its members also calculate termination liability based upon full contract price to lock in customers. Ameritech concludes that ASCENT is essentially asking the Commission to permit it to manipulate the market by allowing it to charge excessive termination rates, while prohibiting Ameritech from charging reasonable termination rates.

Mr. Wilson stated that Ameritech did not introduce its calling plans prior to the advent of significant competition. He noted that these plans produce less revenue than Ameritech's standard monthly rates. Therefore, he indicated that Ameritech had a disincentive to introduce optional calling plans prior to the advent of significant competition. He cited ValueLink-Illinois, the first optional calling plan for Band C usage, which was declared competitive for large business customers on January 23, 1995 and for all other customers on April 7, 1996. He testified that at the time of the competitive declaration, Ameritech had already lost a significant market share for Band C usage.

Mr. Wilson testified that the calling plans, far from being anti-competitive, were developed in direct response to the types of plans that Ameritech's competitors were offering. He indicated that while volume discounts gave customers low prices, the discounts failed to promote brand identification or brand loyalty, which are critical elements in a competitive market. He stated that the calling plans promote brand loyalty by offering recognizable discounts. Mr. Wilson concluded that termination charges were imposed only after significant competition developed and appropriate competitive declarations were made.

In response to ASCENT's contention that Ameritech locked in customers prematurely by reclassifying noncompetitive services as competitive, Mr. Wilson noted that the reclassification applies only to business access services, Bands A and B local usage services, and Custom and Advanced Custom Calling Services included in the ValueLink Extra, ValueLink Extra Select, Ameritech CompleteLink and Ameritech StraightRate plans. He stated that only the latter two plans are being offered to new customers and that it is unlikely that the Commission would find these services noncompetitive, given the rivalry among CLECs to provide such services. He added that if the Commission were to determine that some of the services in the CompleteLink and StraightRate plans were noncompetitive, Ameritech would need to reevaluate its tariffs. Mr. Wilson further stated that even if the Commission determined that some of the services in the optional calling plans were noncompetitive, those services might still be competitive as to specific customers if those customers had competitive choices for the services at the time of purchase.

Addressing ASCENT's assertion that the termination charges are unconscionable, Mr. Wilson argued that the purpose of such charges is to make the non-terminating party whole. He hypothesized that a grain buyer who breaches a contract containing a termination charge will still be liable for the charge, even if he received no benefit under the contract. Mr. Wilson indicated that since the purpose of the termination charge is to compensate the seller for its losses from the breach of the contract, the benefits received under the contract are irrelevant.

In concluding that Ameritech's termination liability provisions are not unconscionable, Mr. Wilson indicated that ASCENT's complaint focuses only on one aspect of Ameritech's optional calling plans, the scope of the discount. He stated that in order to determine whether there is a gross disparity in values exchanged, all of the benefits exchanged under the contract must be compared. He emphasized that customers receive multiple benefits under Ameritech's optional calling plans, including quality telecommunications services, guaranteed discounted prices and certainty of supply. He also noted that customers are permitted to combine multiple accounts and locations to take advantage of higher discounts and receive combined bills. He opined that gross inequality of bargaining position does not exist because customers are free to choose between Ameritech's business services and those offered by its competitors. He indicated that while the optional calling plans are offered under tariff, Ameritech requires that the customer sign a service agreement acknowledging that the customer has ordered the plan. He noted that the service agreement spells out the termination liability if the customer prematurely terminates the plan. He indicated that the optional calling plans contain a satisfaction guarantee allowing customers to cancel the plan without termination liability during the first 90 days of service under the plans.

Ameritech asserts that ASCENT's case is based upon the argument that the termination charges do not bear a reasonable relationship to the discounts earned under the ValueLink plans, compared to what customers would have paid under plans of shorter duration. Ameritech indicates that while ASCENT equates reasonable termination liability with the value of the discounts earned, proper termination charges should reasonably approximate actual or anticipated damages, taking into account the difficulties of proof.

Ameritech next asserts that since Restatement 356 is more specific, it supercedes Restatement 208. Ameritech notes that Restatement 356 states that an agreement may provide for liquidated damages, but only at a reasonable amount in light of anticipated or actual loss caused by the breach and difficulties of proof of loss. Ameritech acknowledges that Restatement 356 also states that a term setting unreasonably large liquidated damages is unenforceable as a penalty on the grounds of public policy. Ameritech also cites 810 ILCS §5/2-718, which states that an agreement may liquidate damages for breach by either party, but only at an amount reasonable in light of anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

Nonetheless, Ameritech further argues that limiting its termination charges to the amount of discounts received actually would increase the charges imposed, since the longer into the term a customer keeps service, the lower the charges would be. Furthermore, Ameritech asserts that customer discounts bear no relationship to damages suffered from the breach, which are measured by lost revenues less any avoidable costs, plus incremental expenses incurred. Ameritech states that ASCENT prefers termination liability equal to discounts earned, which assumes that charges so calculated will be lower than damages calculated according to contract law, a formula Ameritech has used previously. Ameritech asserts that it is not precluded from using the current formula to assess termination charges under the ValueLink tariffs.

Mr. Wilson indicated that Ameritech seeks to impose a termination charge on customers who ordered a calling plan, even if it cannot produce a copy of the service agreement, so long as the customer acknowledges ordering the service or Ameritech can otherwise establish that the customer ordered the service. He stated that service is provided pursuant to tariff and a signed agreement is not essential if the customer accepts and pays for the service and internal records confirm that the customer ordered it. He noted that customers are assigned a unique Universal Service Order Code ("USOC") for each variation of each plan. He stated that if records show a USOC for a plan and the customer was billed and did not object, this indicates that the customer ordered the service. He indicated that Ameritech would agree to not impose termination liability if it cannot produce a signed agreement and the customer affirmatively denies it authorized service.

Mr. Wilson testified that when a customer assigns a calling plan to a CLEC for resale, the CLEC becomes an Ameritech wholesale customer and has its own agreement with the customer who made the assignment. He stated that if Ameritech wins the customer back, the customer cancels its agreement with the CLEC and the CLEC cancels its agreement with Ameritech, whereupon Ameritech imposes termination liability. He indicated, however, that Ameritech is willing to forgo collection of the charge if the CLEC provides notice of the win-back to Ameritech's wholesale business unit. Mr. Wilson further asserted that Ameritech does not degrade services as a tool to win customers back.

Ameritech additionally argued that under Section 10-108 of the Act, ASCENT has the burden of proof in this matter. Ameritech states that since ASCENT presented no evidence that the termination charges were excessive under correct legal standards and admitted that they were consistent with industry practice, ASCENT's claim of anti-competitiveness has not been proved and should be denied.

Ameritech also asserts that the rest of the complaint should be denied. Ameritech indicates that the fairness of the termination charges does not depend on whether services are classified competitive or non-competitive. Ameritech states that if customers receive discounts and benefits in exchange for term commitments, it is only fair that they pay a reasonable charge for failure to adhere to such commitments. Furthermore, Ameritech indicates that ASCENT expects that services will be declared non-competitive in Docket 98-0860, but presented no evidence that they actually are. Ameritech states that this claim should be either denied outright or dismissed as premature.

Ameritech further notes that after the close of the record in this proceeding, it decided to reduce the termination charges on all of its ValueLink plans by 50%. The reduction became effective through revised tariff on August 16, 2000. The ALJ took administrative notice of this revision by a ruling issued on September 18, 2000.

In view of the foregoing tariff revision, Ameritech claims that the issue of whether termination charges equal to the customer's minimum financial commitment for the remainder of the term are anti-competitive or excessive is moot since the charges are no longer in effect. Ameritech indicates that its reduction of termination charges by 50% addresses Staff's concern that Ameritech's termination liability provisions act as take-or-pay clauses and impose termination charges that exceed Ameritech's actual losses. Ameritech states that if the Commission believes further investigation of termination charges is warranted, it should initiate a rulemaking to set standards for termination charges applicable to all telecommunications carriers.

IV. ASCENT'S RESPONSE TO AMERITECH

Mr. Capraro testified that the standard articulated by Mr. Wilson for unconscionability required a comparison of the termination charges to the losses suffered by Ameritech. Mr. Capraro asserted that Ameritech failed to produce evidence of the losses it suffered to justify the termination charges. He added that Mr. Wilson also failed to explain how Ameritech's losses under the tariffs in question equaled the remaining minimum revenue commitment, while losses from an ISDN Prime Service or Dedicated Communications Service customer choosing another carrier equaled the penalty proposed by ASCENT - the amount of savings experienced by the customer by entering into a long term contract.

Mr. Capraro testifies that Mr. Wilson addressed the "gross disparity of value" aspect of unconscionability by asserting that customers receive not only discounts, but also quality telecommunications services, guaranteed discounted prices and certainty of supply when they sign long-term contracts with Ameritech. He argues, however, that the added benefits are minimal, because customers who do not sign ValueLink contracts and take service from CLECs receive the same benefits.

Mr. Capraro asserts that any conclusions reached in this docket with respect to Ameritech's termination charges should not apply equally to ASCENT members' parallel charges. He explained that the resources ASCENT members expend to sign customers to contracts are substantial and are recoverable only if customers are retained for long periods. He indicated that ASCENT members must employ appropriate penalties to protect against Ameritech's win-back efforts with its various incentive plans. He noted that unlike Ameritech, CLECs did not take away automatic volume discounts and replace them with binding contracts when competition was entering the market.

Mr. Capraro disagreed with Ameritech's position that the Commission should not decide the fate of non-competitive services in this docket until it rules on such services in Docket 98-0860. He testified that contracts containing non-competitive services should be declared void. He asserted that Ameritech should not benefit from its anticompetitive behavior by receiving termination penalties under contracts for non-competitive services.

Mr. Capraro testified that in the situation where a validly executed contract cannot be found, Ameritech should be allowed to enforce the termination penalty only if the customer agrees that it signed a contract, agrees to the period of the contract claimed by Ameritech, and acknowledges that it was informed of the terms of the termination penalty.

V. STAFF'S POSITION

Mr. Omoniyi testified that customers who terminate contracts with Ameritech prior to the end of the contract period would bear termination charges unrelated to the loss suffered by Ameritech as a result of the termination. He indicated that these high termination charges will operate as a disincentive to customers to switch service to competing carriers, regardless of the quality of service, and will leave Ameritech in a better position to retain customers. He further indicated that high termination charges impede competition since it is unlikely that customers could be persuaded to switch service. He stated that the termination charges are also likely to result in a windfall to Ameritech because they are imposed even if contract services are not performed. He indicated that the only way to avoid these charges is to switch to an Ameritech plan of equal or higher cost.

Mr. Omoniyi asserted that resellers who assume Value Link contracts also assume the termination charges. He maintained that this could be a barrier to competition as resellers may not want to assume the risk, and the charges will also dilute competitive business opportunities for the resellers. He testified that the termination charges should be reduced to a level reasonably related to the loss

Ameritech experiences when a customer terminates a contract. Mr. Omoniyi stated that the termination charges should be reasonably linked to the discounts given up by Ameritech.

Staff additionally argued that Ameritech's 50% reduction in charges is still inadequate because any termination liability figured as a percentage of the total revenue commitment is potentially unreasonable and anticompetitive. Furthermore, Ameritech provided no evidence to explain how it arrived at the 50% figure.

Mr. Koch testified that the termination charges complained of are unreasonable, and require the customer to pay an excessive charge. He stated that Ameritech should be allowed to implement a reasonable penalty for early termination that is based on the amount of revenue that the customer has committed to the calling plan. He indicated that Ameritech should be allowed, at a minimum, to charge the customer the total amount of discount that the customer has received prior to termination of the plan. He stated that a penalty of some sort in addition to the value of the discount would also be reasonable. He indicated that Ameritech should also be able to recover costs associated with administering the discount plan and collecting repayment of the discount. Mr. Koch asserted that Docket 98-0860 should not be an issue in determining termination charges, since it is irrelevant whether the services were classified as competitive or non-competitive.

VI. AMERITECH'S RESPONSE TO STAFF

Mr. Wilson testified that Ameritech's termination charges already bear a reasonable relationship to actual damages suffered by breach of contract, which is contrary to Mr. Omoniyi's automatic assumption that they do not. He stated that determining damages for premature termination of a telecommunications agreement is inherently complex and not subject to precise calculation. He stated that factors that should be considered include lost revenue, any offsetting revenues that are received, incremental expenses associated with the agreement that remain unrecovered such as sales commissions, advertising charges and contract administration expenses, the additional expenses incurred as a result of the breach and the avoided costs.

Mr. Wilson opined that a determination of whether Ameritech's termination charges are excessive cannot be made without a complete analysis of the factors listed above. He stated that Mr. Koch did not perform such an analysis. He alleged that Mr. Koch also failed to address the fact that Ameritech's approach to calculating termination liability was consistent with industry practice. Mr. Wilson indicated that Ameritech patterned its termination liability provisions after those used by its competitors in similar contracts with the same types of customers. He stated that no other provider in Illinois uses the methodology proposed by Mr. Koch.

VII. COMMISSION ANALYSIS AND CONCLUSION

As noted above, Complainant requests that the Commission eliminate termination penalties from existing ValueLink and tariff contracts, reduce such penalties in future tariffs and contracts, bar Ameritech from enforcing such penalties when there is no written contract with the ValueLink customer, and prohibit imposition of such penalties on CLECs when Ameritech wins back a ValueLink customer.

A. Ameritech's proposals

Ameritech indicates a willingness to accede, in part, to two of Complainant's demands. First, Ameritech would refrain from enforcing termination charges when it cannot produce a contract and the customer affirmatively declares it did not authorize service. The Commission finds that Ameritech's action affords Complainant the relief it seeks and adequately disposes of this issue. As for Complainant's assertion that some signatures on agreements were unauthorized or were forgeries, Complainant submitted no documents containing the purported forgeries or unauthorized signatures.

Second, Ameritech would not impose termination charges on a CLEC after notification to Ameritech's wholesale business unit by the CLEC that a customer has been won back. However, the Commission does not agree that the CLEC should have the burden of notifying Ameritech's wholesale business unit when a winback occurs. A customer can take its business back to Ameritech without informing its current carrier. Under such a circumstance, the only party with knowledge of the winback would be Ameritech's retail business unit. Therefore, we conclude that meaningful relief for Complainant can only be achieved by requiring Ameritech's retail business unit to provide notice to Ameritech's wholesale business unit, and to the relevant CLEC, that it has won back a customer. In no event, can Ameritech collect termination charges from the CLEC after winback.

The Commission rejects Complainant's suggestion that Ameritech degrades the services it provides to CLECs for resale in order to encourage customers to switch back to Ameritech. Complainant did not produce any evidence to support this claim and failed to cite a single instance in which a win-back occurred for this reason. The mere fact that Ameritech controls the provision of service and wins a customer back is not by itself evidence that the customer switched because the quality of service was deficient.

B. Relationship of this proceeding to Docket 98-0860

Complainant also alleged that Ameritech engaged in anti-competitive conduct by charging usage commitments and termination charges for non-competitive services that Ameritech then reclassified as competitive. This enabled Ameritech to lock in customers before those customers had an opportunity to consider competitive alternatives. The issue of whether Ameritech's previous reclassifications of services from non-competitive to competitive were permissible was submitted to the Commission in Docket 98-0860. That proceeding, however, was abated by recently enacted Section

13-502.5(d) of the Act[3]. Consequently, the Commission has no basis upon which to grant ASCENT's requested relief here.

C. Remaining disputed issues

Having disposed of the preceding issues, the Commission's remaining questions concern whether there is sufficient basis for awarding the other relief Complainant seeks. ASCENT asserts three legal bases for reducing Ameritech's termination penalties – that the Ameritech tariffs authorizing those penalties violate Section 253(a) of the federal Telecommunications Act, that the termination penalties are anti-competitive under Section 13-514 of the Act, and that they are unjust and unreasonable within the meaning of Section 9-250 of the Act. We will address these in turn.

[3] 220 ILCS 5/13-502.5(d).

1. Section 253(a)

By its express terms, Section 253(a)[4] of the Federal Telecommunications Act addresses state and local *statutes, regulations or other legal requirements* that prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications service. It does not address private conduct. Nonetheless, ASCENT claims, without citation to any legal support, that "allowing Ameritech to continue to charge penalties under its filed tariffs is state action." ASCENT BOE, at 4. We are aware of no authority for the proposition that Commission acceptance of a tariff for filing establishes a state "legal requirement" within the meaning of Section 253. As a result, there is no basis in this record for finding that the ValueLink termination charges violate Section 253(a).

2. Section 13-514

Section 13-514 of the Act states, in relevant part:

> Prohibited Action of Telecommunications Carriers. A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited: [enumerated prohibited actions omitted].

The foregoing statutory text includes terms (e.g., "impede the development of competition") that are not self-defining. Accordingly, "the Legislature has left it to the Commission to determine more specifically, in the context of the actual operations of the industries we regulate, what constitutes prohibited conduct." Citizens Utility Board v. Illinois Bell Telephone, Docket 00-0043, Order, January 23, 2001, at 8. In this instance, ASCENT's claim is that the ValueLink termination charges "impede the development of competition" because they are high enough to constitute a penalty, thus locking in the potential customers of alternative carriers. Staff echoes this position. "The penalty works as a disincentive to customers to switch their service to any other competing carrier regardless of quality of service, price and other incentives." Staff Init. Brief, at 3.

The Commission finds it self-evident that when a customer has a long-term agreement with a service provider, and when that agreement is enforced by a large termination penalty, the customer cannot participate in a competitive marketplace. The marketplace ramifications of such customer control are especially broad when the

[4] "No state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 USC 253(a).

pertinent service provider recently enjoyed a state-protected monopoly and still retains most of the available customers. Alternative providers cannot hope to survive – and the benefits of competition cannot be distributed – unless customers are free to choose their carriers.

Nonetheless, it could be argued that *any* termination charge is an impediment to competition, to the extent that it attaches additional cost to the customer's decision to switch carriers. The Commission is not prepared to go that far. We do not believe that the Legislature intended Section 13-514 to be used to discard all termination charges imposed by incumbent providers, thereby prompting carriers to end term discounts. We do believe, however, that Section 13-514 evinces the legislative intention to prohibit unreasonable termination penalties that impede competitive development.

In our judgment, a termination penalty is unreasonable if its primary effect is to lock customers away from competitive advances during the transition to a competitive market, rather than to protect the involved carrier against economic damage from the specific agreement. Ameritech acknowledges that a termination charge imposed to lock in customers is unlawful. Ameritech BOE, at 12. Indeed, this Commission has already indicated that customer lock-ins by the incumbent provider are anti-competitive[5].

We conclude that both the intention and primary effect of the ValueLink termination penalties has been to lock customers away from emerging competition. The sheer size of the potential penalty for terminating a ValueLink agreement makes it likely that customer lock-in will be its primary effect. For example, ASCENT calculates a potential penalty of $50,000 for terminating a ValueLink Extra agreement after the first year of a three-year commitment (compared to a potential discount over the life of the contract of $2,250[6]). This is a formidable penalty for the small- and medium-sized businesses that utilize tariff-based agreements[7]. Further, a penalty of such magnitude cannot be absorbed by an alternative provider to win the customer away.

Ameritech asserts, however that only 13.4% of its business customers purchase ValueLink services. According to Ameritech, that fact demonstrates that it has not been locking in customers. The Commission disagrees with Ameritech's logic. The meaningful fact is that a significant number of customers are locked in, not that other

[5]"[T]he record also reflects that Ameritech Illinois is seeking to employ contracts upon reclassification that will lock in Business Band B and C customers to long-term contracts with significant penalties for customers seeking to switch telecommunications providers....By locking in customers contractually before presubscription is available, Ameritech has created a further barrier to competition in the market." Illinois Bell Telephone Company: Proposed Reclassification of Business Bands B & C, Dockets 95-0135 & 95-0179 (consol.), Order, Oct. 16, 1995, at 59.

[6] Ameritech disputes ASCENT's calculation of the potential discount, Ameritech BOE, at 19-20, but has not disproved the potential magnitude of the penalty.

[7] For example, in the case of ValueLink Illinois – Option F Preferred, customers cannot exceed 19 service lines.

customers are not. Furthermore, 13.4% is a significant portion of the contestable market, and those customers are discouraged from seeking - and CLECs are discouraged from offering - competitive alternatives, because the ValueLink agreements are enforced by extraordinary termination penalties. Moreover, in this instance, 13.4 is apparently the numerator in a fraction that uses the entire business market as a denominator. Since some number of business customers would not or could not use a ValueLink service (because their enterprises are too small, too large or require services not included in ValueLink), the fact that 13.4% of *all* business customers are subject to the ValueLink termination charges is proof of substantial anti-competitive impact in the marketplace.

The Commission rejects Ameritech's contention, unsupported by any market share statistics, that the ValueLink tariffs were developed in response to competition that had already emerged for Band C usage. Competitive classification and equal access for Band C calls[8] were not introduced until April 7, 1996[9]. Thus, functionally equivalent Band C usage competition was not technically possible, or reasonably available to the mass market, prior to that date. The Value-Link Illinois tariff, designed for Band C calling, took effect the following day. Enhanced Ameritech ValueLink Plus became effective on May 1, 1996. Sustainable competition for Band C calls could not have developed in a single day or in three weeks. Rather, these facts indicate that the termination penalties associated with the foregoing ValueLink services were introduced to lock in customers and thereby thwart the emergence of competition.

Nevertheless, Ameritech maintains that its ValueLink termination charges are intended solely to provide compensation for actual damages and, for that reason, are not unreasonable within the meaning of Section 13-514. The Commission does not agree. When a termination penalty for telecommunications services consists of the full minimum revenue contemplated by the agreement, it inherently exceeds actual damages. Whatever Ameritech's actual damage may be when a ValueLink agreement is terminated, it is something less than expected revenue, since the subject services cost something to provide.

Further, the ValueLink termination charges are structured in a markedly different manner than the termination charges attached to certain other Ameritech business services. For example, the Winback Term Plan and Business Special Rate III (now discontinued) each impose lump sum $200 penalties, while ISDN Prime Service and Dedicated Communications Services each limit termination liability to the difference between the discounted charges paid under those plans and the greater charges that would have been paid for the customer's actual period of service. Because Ameritech thus uses a variety of schemes for determining its termination penalties, even for plans

[8] Ameritech Band C calls terminate more than 15 miles from the point of origin.
[9] As ordered in Docket 94-0048.

including the same services[10], it is unlikely that all – or perhaps any - of those penalties have been designed to recover actual damages. Ameritech does not claim otherwise, and asserts instead that it is "under no obligation to use the same termination provision in all of its service agreements" and that it develops its calling plans "for different reasons." Ameritech Exh. 1. at 18. The pertinent circumstances discussed above indicate that the underlying "reason" for the magnitude of the ValueLink termination penalties is not the recovery of actual damages, but the delay of effective competition.

In sum, the Commission holds that the ValueLink termination penalties are unreasonable impediments to the development of competition. They are intended to lock in customers and that is their primary effect. They also have a substantial adverse impact on the ability of customers to choose, and alternative carriers to provide, telecommunications services. Consequently, they are unlawful under Section 13-514.

3. Section 9-250

Section 9-250 states:

> Whenever the Commission after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charge or collected by any public utility for any service or product or commodity, or in connection therewith, or that the rules, regulations, contracts or practices of any of them, affecting such rates or other charges, or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any way in violation of the provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.
>
> The Commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations,

[10] For example, Enhanced Ameritech ValueLink Plus and ValueLink Illinois – Option F, like the Winback Term Plan and ISDN Prime Service, all include intraMSA toll service. The different termination charges cannot be simply ascribed to differences in the cost of providing the subject services.

contracts or practices or schedule or schedules, in lieu thereof.

ASCENT's charge is that the ValueLink termination penalties are unjust and unreasonable within the meaning of Section 9-250. Since the general statutory terms "unjust" and "unreasonable" are not self-defining, the Commission must initially identify principles and other criteria by which the justness and reasonableness of termination penalties can be determined.

Prior Commission rulings provide the most appropriate source for standards. We have previously concluded that conduct that is anti-competitive under Section 13-514 is also unjust and unreasonable under Section 9-250. Citizens Utility Board v. Illinois Bell Telephone, Docket 00-0043, Order, January 23, 2001, at 9. It follows, from our determination in the preceding section of this Order that the ValueLink termination penalties are anti-competitive, that they are unjust and unreasonable.

ASCENT recommends that we also refer to contract law to evaluate the justness and reasonableness of the ValueLink termination penalties under Section 9-250[11]. The Commission is an administrative body created to implement the Act, not a court empowered to adjudicate contract disputes under the common law or applicable commercial codes. Accordingly, in complaint proceedings concerning the entities we regulate, the substantive principles and standards we apply must come, in the first instance, from the Act.

Nevertheless, we have found it useful to consult laws and precedents outside our jurisdiction for guidance in developing sound principles to apply to matters within our jurisdiction. Those authorities often reflect reasoned judgment in matters analogous to ours. Citizens Utility Board v. Illinois Bell Telephone, *supra*, is a case in point. There, the Commission consulted the Illinois Consumer Fraud and Deceptive Practices Act[12], as well as state and federal judicial and administrative decisions, to identify criteria for assessing telecommunications marketing. For the purpose of determining here whether the ValueLink termination penalties are unjust and unreasonable for any reason other than their anti-competitiveness, we conclude that it is appropriate to look to contract law for pertinent principles.

ASCENT argues that under the law of contracts the ValueLink termination penalties would be unconscionable and, for that reason, unenforceable as a matter of public policy. ASCENT Init. Brief, at 4. As summarized earlier, ASCENT relies on Restatement Sections 208 and 356 and the Ahern and Saunders decisions. According to Restatement 208:

[11] ASCENT proposes the same inquiry for Section 9-101 of the Act, which similarly requires that "[a]ll rates or other charges" must be just and reasonable.
[12] 815 ILCS 505/1 et seq.

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Restatement 356 says in pertinent part:

> (1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonable large liquidated damages is unenforceable on grounds of public policy as a penalty.

In response, Ameritech cites Restatement 356 in its own behalf, as well as 810 ILCS §5/2-718, claiming that these provisions apply more specifically to the issue of termination charges than does Restatement 208 and related cases. The relevant part of 810 ILCS 5/2-718 essentially mirrors Restatement 356:

> Liquidation or Liquidation of Damages; Deposits. (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

The Commission does not find it necessary to choose between, on the one hand, Restatement 208 and related cases, and, on the other hand, Restatement 356 and 810 ILCS 5/2-718. The latter are not "more specific," as Ameritech asserts. Ameritech Init. Brief, at 13. Rather, the foregoing provisions address distinguishable concepts. Restatement 208 addresses unconscionability, whether in an entire agreement or a "term thereof." Restatement 356 and 810 ILCS 5/2-718 address appropriate criteria for liquidated damages. The Commission will consider all of these.

a) Unconscionability and Restatement 208

Concerning unconscionability, Ahern, Saunders and other cases have generally defined an unconscionable contract as an agreement that is so one-sided that public policy precludes enforcement. Ahern, *supra*; Saunders, *supra*; Piehl v. The Norwegian Old Peoples' Home Society of Chicago, 127 Ill. App. 3d 593; 469 N.E. 2d 705; 83 Ill. Dec. 98 (1984]); William J. Larned v. First Chicago Corporation and FCC National Bank, 264 Ill. App. 3d 697, 636 N.E. 2d 1004; 201 Ill. Dec. 572 (1994). More specifically, unconscionability includes the absence of meaningful choice or bargaining power for one of the parties, along with the imposition of unreasonably harsh terms on that party or a gross disparity in the values exchanged. Ahern, *supra*; Saunders, *supra*; The Hartford Fire Insurance Company v. Architectural Management, 194 Ill. App. 3d 110; 550 N.E. 2d 1110; 141 Ill. Dec. 64 (1990).

With respect to the alleged disparity between the values exchanged by the parties, ASCENT emphasizes that the ValueLink termination charges can be 10 and 20 times greater than the customer's potential savings under a ValueLink agreement. Ameritech responds that the ValueLink customer receives quality telecommunications services, guaranteed discount prices and certainty of supply. However, ASCENT replies that ValueLink customers get the exact same service quality as any other Ameritech customer (and as ASCENT customers whose providers resell Ameritech services). The Commission notes that, indeed, *all* carriers are required to provide services of adequate quality. Concerning supply, ASCENT points out, and the Commission agrees, that there are no supply constraints on the services included in the ValueLink plans.

The sole significant benefit that inures to the ValueLink customer is the discount. The discounts are tangible, but relatively modest[13]. In return, the customer assumes two "take-or-pay" burdens. First, the customer must meet its annual or monthly revenue or usage requirement, or pay the difference between actual revenue/usage and the required minimum. The customer thus takes on monthly the risk of realizing no effective discount at all, since the cost of paying for services not actually received may exceed the small discount associated with minimum revenue/usage. Importantly, this take-or-pay risk is borne even by the customer that does not terminate or otherwise breach the ValueLink agreement. Second, the customer assumes the take-or-pay risk associated with early termination (which may occur for a variety of reasons, including business failure), quantified as the minimum revenue requirement over the intended life of the agreement. In the Commission's view, these facts demonstrate a substantial disparity between the benefits exchanged by the parties to ValueLink agreements.

However, some business customers, in the actual management of their enterprises, have apparently valued the reward of modest discounts over the risk of substantial take-or-pay responsibilities. Accordingly, before we can conclude that the ValueLink termination penalties are unconscionable, the Commission must determine whether customers have risked those penalties in a genuinely voluntary fashion - that is, whether customers have had meaningful choice and sufficient (even if unequal) bargaining power.

The availability of meaningful choice is, for the most part, determined by the presence or absence of competition. Three of the ValueLink service plans (ValueLink Illinois, ValueLink Illinois – Option F, and ValueLink Illinois – Option F Preferred) consist exclusively of discounted Band C services. Enhanced Ameritech ValueLink Plus includes calling card toll and toll free calling as well as Band C usage. As we noted above, equal access and competitive reclassification for Band C usage (11 or fewer access lines) was implemented on April 7, 1996 and the ValueLink Illinois tariff became effective on the following day. Enhanced Ameritech ValueLink Plus became

[13] For example, when expressed as a percentage in the relevant tariffs, the discounts for ValueLink Extra, ValueLink Extra Select and CompleteLink are, respectively, 4-12%, 10% and 2-12.5%. Ameritech Init. Brief, at 3.

effective on May 1, 1996. ValueLink Illinois – Option F and ValueLink Illinois – Option F Preferred were effectively tariffed on July 8, 1997 and January 1, 1998, respectively. The actual availability of competitive alternatives for Band C service over the course of time covered by the evidentiary record was not established by the parties. The Commission can only infer that mass market Band C competition did not exist in April, 1996 but developed to some undetermined degree over time after the introduction of equal access.

The other ValueLink plans include additional services, including essential services that Ameritech did not reclassify as competitive until February 1998[14]. ValueLink Extra (first offered July 1, 1997), ValueLink Extra Select (first offered January 5, 1998) and CompleteLink (first offered May 24, 1999) all include basic access to the public network and local calling, while Ameritech StraightRate (first offered April 22, 1997) includes local calling along with Band C usage. Network access and local usage are gateway services, without which the other services included in the ValueLink plans are unobtainable. The actual availability of competitive alternatives for network access and local usage over the course of time covered by the evidentiary record was, again, not established by the parties. The Commission can only infer that mass market competition for network access and local usage did not exist when ValueLink Extra, ValueLink Extra Select and StraightRate were introduced, but developed over time to some undetermined degree thereafter.

Based on the preceding facts, the Commission finds that customers lacked meaningful alternatives for the ValueLink Illinois, Enhanced Ameritech ValueLink Plus, ValueLink Extra, ValueLink Extra Select and Ameritech StraightRate when they were introduced. Customers could obtain a modest ValueLink discount only by accepting take-or-pay requirements, including dramatically disproportionate termination penalties. Of course, Ameritech's own non-discounted services were also available. However, by ending the previous volume discounts, on which business customers had previously estimated their telecommunications expenses, Ameritech had created a context in which those customers would seek options for maintaining their cost of doing business. Tr. 66-67 (Capraro). Moreover, those customers had not merely inferior bargaining power, but no bargaining power at all. Bargaining is not permitted for tariffed services.

Accordingly, guided by the unconscionability principles embodied in Restatement 208 and the precedents cited above, the Commission concludes that the termination penalties contained in Ameritech's ValueLink Illinois, Enhanced Ameritech ValueLink Plus, ValueLink Extra, ValueLink Extra Select and Ameritech StraightRate tariffs and agreements were unconscionable, and therefore unjust and unreasonable under Section 9-250, when introduced. We cannot, however, reach the same conclusion with respect to ValueLink Illinois – Option F, ValueLink Illinois – Option F

[14] The Commission investigated the validity of the reclassification of many of those services in Docket 98-0860. That proceeding was abated with respect to existing reclassifications, and the forward-looking classification of the pertinent services was definitively determined, as of June 30, 2001, when Section 13-502.5 became effective.

Preferred and CompleteLink, which were at least nominally competitive when introduced.

With respect to all the ValueLink services, some indeterminate degree of competition developed over their respective lifetimes. However, the Commission will not encourage unconscionable tariff-based agreements by allowing subsequent circumstances to "cure" the unconscionability that was present when a product was introduced. Accordingly, our conclusion that ValueLink Illinois, Enhanced Ameritech ValueLink Plus, ValueLink Extra, ValueLink Extra Select and Ameritech StraightRate were unconscionable, and therefore unjust and unreasonable, will not be altered by later events.

b) Restatement 356 and 810 ILCS 5/2-718

By their terms, neither the Restatement nor the statute requires that liquidated damages be *equal to* the likely amount of the loss caused by termination. Rather, they require a liquidated amount that is "reasonable in light of" anticipated or actual damage. A provision for unreasonably large liquidated damages is void as a penalty. A two-part analysis is therefore required – first, how are anticipated or actual damages determined and, second, is the liquidated amount involved here (minimum required revenue over the remaining life of the agreement) "reasonable in light of" those damages?

The parties derive answers to the first question from the same judicial precedent. Ameritech maintains that damages are properly "measured by the revenues the Company loses, less any avoidable costs, plus any incremental expenses it incurs." Ameritech Init. Brief, at 15-16, citing Sterling Freight Lines, Inc. v. Prairie Material Sales, Inc., 285 Ill. App. 3d 914 (1997) and other cases. ASCENT also cites Sterling Freight Lines, but for the principle that liquidated damages should not place the non-terminating party "in a better position" than if no termination had occurred. ASCENT Reply BOE, at 10. ASCENT further argues that damages should be limited to lost profits, which it defines as net profits. *Id.*, at 9, citing Getschow v. Commonwealth Edison Co., 111 Ill.App.3d 522, 67 Ill.Dec. 343, 444 N.E.2d 579 (1982). Getschow states that net profits are measured by subtracting expenses from gross profits.

The termination penalties in the ValueLink tariffs and contracts obligate the terminating party to pay for all minimum usage required over the remaining life of the agreement. This is inconsistent with Ameritech's own formula for determining actual damages, since avoidable costs are not subtracted. Similarly, under the principles advanced by ASCENT, the ValueLink penalties put Ameritech "in a better position" than if no termination had occurred, because Ameritech recovers the cost of providing undelivered services. Ameritech thus receives more than its gross profits, let alone its net profits. Moreover, direct incremental expenses made necessary by early termination (if any) are not expressly identified or quantified at all. Therefore, we find that the ValueLink termination penalties are not designed to recover actual damages under either Ameritech's formula or ASCENT's principles.

Regarding the second question posed above, since the ValueLink penalties are not designed to recover actual damages, they cannot be reasonably related to them, except by coincidence. Moreover, the relationship between actual damages and the termination penalties is especially unreasonable when the customer first begins receiving a ValueLink service. If the customer terminates shortly after the initial ninety days (or after the first day, for ValueLink Illinois and ValueLink Extra), Ameritech can require payment of all remaining minimum usage for as many as 33 months (and for CompleteLink, 57 months). Ameritech thus enjoys a windfall recovery of the cost of providing years of undelivered services. If the customer terminates later, Ameritech's recovery is smaller, but it always includes costs that Ameritech will not actually incur and, therefore, includes profits that exceed both gross and net. Consequently, the Commission finds that such damages are not reasonable in light of Ameritech's anticipated or actual damage and, for that reason, would be void as a penalty under 810 ILCS 5/2-718 and Restatement 356.

The Commission does not mean to require that a termination penalty must exactly equal actual damages. Some of the ValueLink packages (e.g., ValueLink Extra Select and CompleteLink) combine several discrete services that have different underlying cost bases. A determination of actual loss for these packages would necessitate complex calculations, based on careful cost studies. In view of that complexity – that is, in view of what 810 ILCS 5/2-718 and Restatement 356 both call the "difficulties of proof of loss" - the Commission believes that it is just and reasonable, in concept, to liquidate damages for such telecommunications services. However, a liquidation provision that simply demands payment of anticipated revenues, without regard for avoidable expenses, is not just and reasonable. Accordingly, the termination penalties provisions of each of the ValueLink services contravene Section 9-250.

We are mindful of Ameritech's insistence that ASCENT has the burden of proof in this proceeding. However, for the reasons stated above, the ValueLink termination penalties are *prima facie* unreasonable, since they do not take into account Ameritech's avoidable costs. Ameritech itself argued for that standard, and the complainant's burden can be satisfied by evidence and argument from the respondent.

D. Remedies

Upon a finding of unjustness and unreasonableness, Section 9-250 mandates that the Commission "shall determine" the just and reasonable charges to be imposed in the future. (This mandate is discussed in greater detail in the next section of this Order.) Therefore, the Commission will prescribe termination penalties to be included in ValueLink tariffs and agreements on a forward-looking basis.

As we observed above, the Commission's mandate is not to mechanically apply traditional contract remedies, but to implement the Act. Subsections 13-102(e)[15] and (f)[16] and 13-103(b)[17] emphasize the importance of promoting competition in the telecommunications marketplace. In view of our finding above that the ValueLink termination penalties frustrate the expansion of competition, it is essential that we establish termination penalties that will accommodate competition at the same time that they accord fair treatment to the particular parties involved.

Furthermore, this dispute is not simply about contracts. Even when there is a signed agreement, the ValueLink services are nonetheless offered pursuant to the *tariffs* that authorize such agreements and limit their terms[18]. Indeed, Ameritech uses that fact to impose termination penalties when no written contract exists. "The ValueLink plans are provided under tariffs, and the tariffs do not require signed agreements." Ameritech Init. Brief, at 9. Similarly, Ameritech was able to unilaterally reduce the ValueLink termination penalties in existing agreements by altering its tariffs. Absent the tariffs, Ameritech could not have accomplished that unilaterally (without express contract language or waiver).

Moreover, as previously discussed, Ameritech itself does not necessarily base its penalties on what it perceives to be its entitlement under contract law. In contrast to the ValueLink termination charges, Ameritech has a $200 termination penalty for the Winback Term Plan and Business Special Rate, and requires only return of discounts for ISDN Prime Service and Dedicated Communication Service. It accepts these more modest termination penalties despite acknowledging that the same cost items it insists should be recovered in the ValueLink termination penalties are also associated with ISDN Prime services. Tr. 116-118 (Wilson).

For the foregoing reasons, while contract principles can provide guidance, the Commission will require termination penalties that are best suited to the purposes of our Act.

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[15] "[I]t is in the immediate interest of the People of the State of Illinois for the State to exercise its rights within the new framework of federal telecommunications policy to ensure that the economic benefits of competition in all telecommunications service markets are realized as effectively as possible." 220 ILCS 5/13-102(e).

[16] "[T]he competitive offering of all telecommunications services will increase innovation and efficiency in the provision of telecommunications services and may lead to reduced prices for consumers, increased investment in communications infrastructure, the creation of new jobs, and the attraction of new business to Illinois." 220 ILCS 5/13-102(f).

[17] "[C]onsistent with the protection of consumers of telecommunications services and the furtherance of other public interest goals, competition in all telecommunications service markets should be pursued as a substitute for regulation in determining the variety, quality and price of telecommunications services...." 220 ILCS 5/13-103(b).

[18] "The company's official tariff on file, publicly, with the Illinois Commerce Commission, containing, *inter alia*, the foregoing provisions here material as part of the terms and conditions upon which telephone service is rendered, is necessarily a component and integral part of its contracts...." Illinois Bell Telephone Co. v. Miner, 11 Ill.App.2d 44, 58 136 N.E.2d 1,8 (1956).

Staff proposes that Ameritech be allowed to charge the customer the total amount of discount received prior to termination, plus the costs associated with administering the plan and collecting the penalty. Staff Init. Brief, at 4. ASCENT recommends that the penalty equal the difference between the amount actually paid by the customer under a ValueLink tariff and the amount Ameritech would have charged if the customer had been on rates appropriate to the customer's actual term of service. ASCENT Init. Brief, at 36. Ameritech did not propose a remedy during the evidentiary phase of this proceeding, relying instead - as it was entitled to do - on defense of the termination penalties under complaint. After the record was closed, Ameritech lowered those penalties to 50% of a customer's remaining minimum revenue requirement.

Although not identical, both the ASCENT and Staff proposals would require customers to return discounts they enjoyed prior to termination. Therefore, like Ameritech's "benefit of the bargain" penalty, both are readily quantifiable. They are also consistent with Ameritech's termination penalties for certain other services, as described above. Moreover, while they deny Ameritech the profit it would have received over the full life of a ValueLink term, they *increase* the profit Ameritech derives from the services that were delivered prior to termination. "[I]n a term agreement, Ameritech Illinois accepts a *smaller profit* than it would earn on month-to-month rates." Ameritech RBOE, at 3 (emphasis added). Additionally, ASCENT and Ameritech agree that the Ohio Public Utilities Commission ("PUC") ordered Ameritech Ohio to use a return-of-the-discount termination penalty for customers permitted to exit long-term agreements. Ameritech Reply Brief, at 19; ASCENT Init. Brief, at 32-33, each citing 1997 Ohio PUC LEXIS 537.

On the other hand, as Ameritech correctly points out, under Staff's recommendation (return of the "total" discount received), "[t]ermination charges would *increase* as the term remaining on the plan *decreased*." Ameritech Init. Brief, at 15 (emphasis in original). This occurs because the total discount enjoyed by the customer increases over time (as does the rate of discount), thereby increasing the amount the customer would have to refund upon termination. It follows that at some point in time, the Staff termination penalty would exceed a penalty based on Ameritech's formula for contract damages (revenues and consequential costs less avoidable costs). In essence, Ameritech's penalty discourages early termination while the Staff penalty discourages later termination. Accordingly, the Commission finds that Staff's reimbursement proposal would not remove the anti-competitive impact of the ValueLink termination penalties, but would merely shift that impact to a later stage in the term of service originally selected by the ValueLink customer.

In contrast, ASCENT's termination penalty (return of *unearned* discount) would allow the customer to retain the benefits of any ValueLink discount for which it fulfilled the requirements over its actual term of service. For example, ValueLink Illinois is offered in 12-, 24- and 36-month increments. Under ASCENT's proposal, when a customer with a 24-month commitment terminates after 18 months, it retains the discount associated with a 12-month commitment, because it fulfilled the requirement for that discount (i.e., it took 12 months of service). However, that customer would have to return the discounts it enjoyed during the 13th through 18th months of service, because it did not fulfill the requirement for that service (i.e., it did not take 24 months of service). The customer's refund obligation would be calculated by subtracting the discounted charges the customer incurred during the 13th through 18th months from the greater charges the customer would have incurred had it continued to be subject to the rates applicable to its first 12 months of service.

The ValueLink termination charge resulting from ASCENT's proposal would resemble the termination provisions in the Ameritech ISDN Prime Service tariff[19] and Dedicated Communications Services Tariff.[20] In each of the latter tariffs, the customer is responsible for unearned discounts – that is, for any discounts for which the customer did not fulfill the minimum requirements. The customer retains any discounts associated with its actual service term. This is also the termination provision adopted by the Ohio PUC, as noted above.

In our judgment, the foregoing termination obligation promotes competition and enhances the public interest in two respects. First, it eliminates the anti-competitive impact of an unlimited return-of-the-discount penalty. Customers in the latter stages of a multi-year commitment will not confront a massive termination penalty. Second, the termination obligation works in conjunction with existing features of the ValueLink tariffs to benefit customers. This is so because most of the ValueLink tariffs require service commitments of one, two or three years and increase the discount rate after the initial 12 and 24 months of service. Consequently, while customers with multi-year commitments will not face prohibitive penalties after 12 and 24 months of service, they will have to weigh competing CLEC offers against the expanding ValueLink discount. This should prompt CLECs to sweeten their own prices and prompt Ameritech to consider increasing its later-year discounts to retain customers.

Such competitive interplay will benefit telecommunications consumers, while the requirement to return unearned discounts will discourage customers from making insincere long-term commitments in order to enjoy short-term discounts from Ameritech. The Commission believes a return-of-the-unearned-discount termination obligation properly balances the interests of customers, CLECs and Ameritech and enhances the public interest generally.

We note that two of the ValueLink plans are not offered in 12-, 24- and 36-month increments. Ameritech CompleteLink is available in one-, three- and five-year

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[19] "The dollar difference between the current monthly...price for the...term that could have been completed during the time the service was actually in service and the customer's current...price for each month the service was provided." Ill. C.C. No. 19, Part 17, Sec. 2, 1st Revised Sheet No. 15, ASCENT Exh. 1, Sch. WAC 1.2.

[20] "The dollar difference between the current monthly...price for the...term that could have been completed during the time the service was actually in service or the monthly price for service in place less than 12 months and the customer's current...price for each month the service was provided." Ill. C.C. No. 19, Part 15, Sec. 1, 1st Revised Sheet No. 40, ASCENT Exh. 1, Sch. WAC 1.2.

increments, and ValueLink Extra is provided in two- and three-year increments[21]. Therefore, the customers of these services, unlike customers of the other ValueLink plans, can face termination penalties amounting to almost 24 months of unearned discounts. The Commission believes that in such cases, the return-of-the-unearned-discount penalty would have virtually the same anti-competitive impact as Staff's return-of-the-total-discount penalty. Consequently, we will limit the customer's potential termination liability to the unearned discount actually received over no more than the twelve months immediately preceding termination of CompleteLink or ValueLink Extra service. Thus, a customer that terminates after, say, 30 months of CompleteLink service would have to return the discount enjoyed during the 19th through 30th months, but not the discount received during the 13th through 19th months (nor the earned discount received during the 1st through 12th month).

The Commission recognizes that the Ohio PUC did not cap the customer's return-of-the-discount liability when it effectively altered early termination penalties in that state. However, the Ohio PUC was implementing a "fresh look[22]" regime that permitted termination only for customers with more than two years remaining on their agreements. Accordingly, the Ohio PUC did not need to consider the dilemma we face here – that is, how to avoid the anti-competitive effect associated with the return-of-the-total-discount termination penalty in the later stages of an agreement.

Additionally, the Commission rejects Staff's recommendation to include in the ValueLink termination penalties (in addition to the return of the discount) an amount representing the costs of administering the discount and collecting its repayment upon termination. Ameritech's administrative costs are already included in the costs of its services[23]. Although Ameritech objects that "those costs are recovered over the life of the plan," *id.*, it fails to acknowledge that some of those costs are also *incurred* over the life of a ValueLink plan. This is exemplified by some of the cost items cited by Ameritech ("calculating discounts earned or revenue shortfalls, and billing and collecting revenue shortfalls," *id.*). Other cited cost items (e.g., advertising) are built into the rates for all Ameritech services and recovered with each unit of service sold, whether in or out of a ValueLink plan. Actual recovery is not guaranteed, and Ameritech over- or under-recovers those costs depending upon its overall business success. Such costs are not specifically attributable to ValueLink.

As for the cost of retrieving the benefit of the discount from the customer, the Commission does not believe that the settlement of a ValueLink account is different from the settlement of any other account. Billing costs are already taken into account

[21] ValueLink Extra was grandparented in 1999 and will be withdrawn on or before October 8, 2002.
[22] "Fresh look" attempts to promote competition by giving customers a time-limited opportunity to exit long-term contracts.
[23] Ameritech complains about the absence of "record support" for this fact. Ameritech BOE, at 27. However, this is a fundamental fact of utility ratemaking that need not be re-established in every proceeding. Moreover, Ameritech acknowledges that it is correct. *Id.*

when setting rates, and there is no additional account cost recovery fee associated with other Ameritech services.

Furthermore, by permitting Ameritech to retrieve the discount given to the ValueLink customer during (as much as) the first twelve months of service, the Commission is allowing Ameritech to increase the profit it earned during those months. We believe that this higher profit margin, combined with the costs that the Company will avoid when a ValueLink contract is terminated, will more than compensate for any unrecovered portion of, say, advertising costs attributable to termination.

In sum, we will order that the ValueLink termination penalties equal the unearned discount received by the customer during its actual term of service. The unearned discount should be calculated by subtracting the discounted charges the customer actually incurred during its term of service from the charges the customer should have incurred, based on its actual term of service, under the pertinent ValueLink tariff. Ameritech is prohibited from including earned discounts, as described in this Order, in a ValueLink termination charge. Ameritech is further prohibited from including in a ValueLink termination charge any unearned discounts associated with ValueLink services provided more than 12 months before service termination.

Also, the Commission observes that the Ohio PUC wisely addressed issues that the parties here did not. In particular, the Ohio PUC apportioned responsibility and set forth procedures for calculating the discount to be returned to Ameritech. The Ohio PUC assigns calculation responsibilities to the carrier, once the customer has submitted an oral or written request. The Ohio PUC allows customers to use the CLECs as agents when requesting calculations. The calculated result must be provided to the customer or agent within three business days. In the event of a dispute, the carrier would bear the burden of justifying its calculation. In order to obviate the need for future administrative litigation regarding implementation of this Order, we will use this opportunity to require customers and Ameritech to adhere to the foregoing procedures when calculating ValueLink termination penalties in Illinois[24].

E. CLEC termination penalties & additional proceedings

Ameritech argues that in the event we find its ValueLink termination penalties anti-competitive, unjust and unreasonable, the Commission must initiate a generic rulemaking to "investigate the propriety of termination charges imposed by all carriers subject to its jurisdiction." Ameritech Init. Brief, at 21. Ameritech emphasizes ASCENT's own testimony that some ASCENT members impose termination penalties much like the Ameritech penalties we disapprove of here. Therefore, Ameritech contends, it would be discriminatory and anti-competitive to limit Ameritech's termination penalties without imposing comparable limits on the CLECs.

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[24] Ameritech was a party to the Ohio proceeding in 1997 and we assume it can meet parallel requirements in this state.

Even if we were to initiate a generic rulemaking, it would not alter the outcome of this proceeding with regard to Ameritech. As ASCENT correctly points out, this Commission has already established that a carrier's unlawful conduct cannot continue while we scrutinize other carriers. ASCENT Reply BOE, at 4-6, citing Docket 00-0043, Order, January 23, 2001, at 41-42. Ameritech acknowledges this. Ameritech BOE, at 12, fn. 6. Therefore, the ValueLink termination charges must be revised in accordance with this Order, irrespective of any other action the Commission may take.

Moreover, the Commission is not willing to initiate a rulemaking without more information and analysis. This proceeding has focused on Ameritech. The charges and practices of the members of ASCENT and other Illinois CLECs have not been adequately identified, much less fully explored, in the present record. Indeed, the sole documentary evidence here regarding CLEC term discounts and associated termination charges is a portion of a single CLEC tariff[25]. The Commission cannot apply the laws or principles discussed in this Order to circumstances that have yet to be sufficiently identified and evaluated. Nor can we determine at this juncture whether different principles can or should apply to CLECs. The Commission will not put the cart before the horse. A rulemaking will not occur unless and until the need for it has been established by thorough investigation.

There is, however, reason to begin an investigation. ASCENT has stated that it is "willing for the Illinois Commerce Commission to assume for purposes of this proceeding...that some of [its members'] term commitment contracts and tariffs provide for termination penalties that are based on the minimum commitment for the remaining term of the contract...[and that] a large percentage of the customers of [ASCENT members] receive services under term commitment contracts." Ameritech Exh. 1, at 9 (quoting an ASCENT response to an Ameritech data request). Thus, some CLECs may be imposing termination charges for the primary purpose of preventing the exercise of customer choice (including the choice of switching to another CLEC). To determine whether such practices are occurring, and whether they are unjust, unreasonable or anti-competitive, we will direct Staff to obtain and analyze information regarding CLEC termination charges.

Specifically, we direct Staff to gather sufficient information to support general conclusions regarding CLEC termination charges, to assess that information in light of the principles set forth in this Order, to render an opinion concerning the need for Commission action, and to identify what action, if any, would be appropriate. In its analysis, Staff should consider whether CLECs can and should be subject to different requirements than the historic incumbent local exchange providers. Staff should submit its report to the Commission within 90 days of the entry of this Order.

F. ASCENT'S attorneys' fees & costs

[25] Ameritech Exh. 1, Sch. 1.

ASCENT avers that Section 13-516 of the Act[26] authorizes the Commission to require Ameritech to pay ASCENT's attorneys' fees and litigation costs in this docket. ASCENT BOE, at 9. The pertinent language in Section 13-516 took effect on June 30, 2001, long after the record closed in this proceeding. Ameritech insists that a statute is only applied prospectively "unless the statute itself evidences a clear intention that it be applied retroactively to claims arising before its enactment." Ameritech Reply BOE, at 10-11, citing McAleer Buick-Pontiac v. General Motors, 95 Ill.App.3d 111, 419 N.E.2d 608 (1981). Ameritech notes that Section 13-516 does not address retroactive application. The Commission concludes that Ameritech is correct, both with respect to the general presumption against retroactivity and the absence of retroactive intent in Section 13-516. Therefore, no attorneys' fees or costs will be awarded.

VIII. AMERITECH MOTION TO REOPEN RECORD

On August 8, 2001, the day on which it filed its BOE, Ameritech also filed a Motion to Reopen Record ("Motion") "for the purpose of taking additional evidence on the reasonableness of Ameritech Illinois' *current* termination charges in its ValueLink tariffs." Motion, at 1 (emphasis added). In support of the Motion, Ameritech notes that, as already discussed, it filed ValueLink tariffs on August 15, 2000 that supercede the tariffs under scrutiny here. *Id.*, at 2. The superceding tariffs reduce the ValueLink termination penalties by 50%. The Commission cannot set aside those superceding tariffs, Ameritech contends, unless and until they are found, after notice and hearing, to be unjust, unreasonable or anticompetitive. *Id.*, at 3. Since "[n]o complaint has been filed with respect to the reduced termination charges, nor has Staff initiated an investigation of those charges," *id.*, at 2, Ameritech believes that there must be an additional evidentiary hearing. In such hearing, Ameritech purports that it would "demonstrate that under almost any scenario, [its] actual damages exceed 50% of the revenue commitment remaining on the term." *Id.*, at 4. In Ameritech's judgment, that demonstration would prove that its superceding ValueLink termination penalties are just, reasonable and non-anticompetitive and, for that reason, cannot be set aside. ASCENT and Staff oppose the Motion.

The logic underlying Ameritech's position in this docket is not entirely consistent. Ameritech states that, with respect to the termination charges under complaint, "no relief is required or should be granted because those termination charges no longer exist." Ameritech BOE, at 4. In the Motion, Ameritech claims that its subsequent tariff filing "moot[s] out" the present case. Motion, at 3. However, Ameritech attaches its mootness claim only to "prospective relief." *Id.* Given Ameritech's opinion that the pertinent termination charges no longer exist, it is not clear why the Commission would not be obliged to dismiss this proceeding entirely, since its subject matter has been superceded.

[26] 220 ILCS 5/13-516.

Nevertheless, the Commission will treat the *prospective* mootness theory as Ameritech's core argument. Under that theory, the Commission apparently could, at most, issue only an advisory order addressing what constitutes a just, reasonable and non-anticompetitive termination charge. Ameritech's superceding ValueLink tariffs would remain in force, pending a hearing on their justness, reasonableness and pro-competitiveness under the abstract standards we have articulated. However, pursuant to Section 10-108 of the Act, when a complaint regarding a utility's rates or charges is filed under Article 9, "the Commission *shall* make and render findings concerning the subject matter and facts complained of and enter its order based thereon." (Emphasis added.) The Motion thus causes the Commission to consider the interplay between our remedial power regarding a tariff subject to complaint and the limits on our power regarding a superceding tariff. Specifically, after a finding of violation pursuant to Section 9-250, in the context of a complaint under Section 10-108, can we set the rate for a service even though the carrier has altered the unlawful rate pursuant to Section 13-505 and the superceding rate has not undergone a Section 9-250 hearing? We conclude that we can do so.

In Section 9-250, the Legislature shaped our authority as both a duty and a power. Regarding duty, after a violation has been established, "the Commission *shall* determine the just, reasonable or sufficient rates or other charges...to be observed and thereafter in force." (Emphasis added.) Additionally, "[t]he Commission shall have the *power*...to establish new rates or other charges[27]." (Emphasis added.) Therefore, absent a countervailing limit on our authority, we are required or - at the least - empowered to establish the forward-looking termination charges associated with the ValueLink services.

Furthermore, in the context of a complaint, the complainant also has important rights. The Commission's duty to make findings and enter an order under Section 10-108 implies that the Complainant has a corresponding right to receive redress concerning the subject of the complaint. Importantly, Section 10-108 preserves that right even though the respondent has provided unilateral relief. "The Commission shall have authority to hear and investigate any complaint notwithstanding the fact that the person or corporation complained of may have satisfied the complaint." 220 ILCS 5/10-108.

On the other side of the coin, subsection 13-505(a) provides that "[a]ny proposed increase or decrease in rates or charges...for a competitive telecommunications service shall be permitted upon the filing of the proposed rate, charge...or tariff." 220 ILCS 5/13-505(a). The revised ValueLink tariffs took effect under this subsection and, according to Ameritech, they cannot be superceded without the notice and hearing contemplated by Section 9-250.

[27] Notably, the duty is expressly predicated upon a finding of violation, while the power is not. It is not necessary here, however, to determine the extent of the power in the absence of a violation, since we conclude that Ameritech's termination penalties are unjust, unreasonable and anti-competitive.

In our judgment, the complainant's right to redress, the Commission's duty to provide that redress, and the Commission's duty and power to require just, reasonable and non-anticompetitive tariffs and practices would all be nullified if Ameritech's right to change its competitive rates foreclosed remedial action concerning its telecommunications services. Since a revised competitive rate becomes effective when filed, Ameritech could always render a complaint obsolete with a new tariff. The complaint process is far too slow, relative to the speed with which Ameritech can alter its competitive tariffs, to ever catch up. As a result, the mootness doctrine would essentially trump the legislative scheme by which the Commission corrects unlawful rates and injured parties obtain relief under the Act.

Although our research has not discovered an Illinois precedent directly on point, we have found that this state's courts do not regard mootness as an absolute bar to further proceedings or forward-looking remedies.

> It is our conclusion that mootness is not a defense of merit which may be raised by defendants to defeat the immediate litigation. Rather, mootness is a doctrine which the court imposes for its own protection, and it will not be applied where it is apparent that the controversy is a genuine one concerning valuable rights and where the party defending maintains that it still has the power to annul those rights and to recreate the condition as it existed at the time the litigation was commenced.

Kern v. Chicago & Eastern Illinois Railroad Co., 44 Ill. App.2d 468, 195 N.E.2d 197 (1963). Here, a genuine controversy continues. Ameritech stands by its argument that a termination penalty like the one we adopt in this Order would violate contract law and Ameritech's property rights. Ameritech BOE, at 8. Moreover, under Section 13-505, Ameritech can revise its ValueLink tariffs again, whether to restore the termination penalties that triggered the Complaint or otherwise.

Beyond Illinois, the tension between the utility's right to revise its tariffs and the regulator's remedial authority was addressed in Colorado-Ute Electric Assoc., Inc. v. Public Utilities Commission of Colorado, 760 P.2d 627 (Sup. Ct. Colo. 1988). Colorado-Ute, the electric power cooperative in that case, filed a tariff for electricity sales that superceded the tariff under litigation. Consequently, Colorado-Ute contended that appeals concerning the original tariff should be dismissed as moot. The court stated that "Colo-Ute's argument, if accepted, would operate to insulate much of its activity from judicial and/or Commission review...If a cooperative could render an appeal moot merely by filing a new tariff while an appeal is pending, the Commission's authority to regulate cooperative utilities would be undermined." 760 P.2d at 634. Accordingly, the court held that Colorado-Ute's mootness argument was "without merit." *Id.*, at 635. The rationale of Colorado-Ute confirms our view regarding the primacy of our remedial authority under Sections 9-250 and 10-108.

Indeed, by applying the Colorado-Ute rationale to our circumstances here, the tension among Sections 9-250, 10-108 and 13-505 is resolved. The carrier's rate revision is "permitted," as contemplated by the language of 13-505, and remains in effect until such time as a remedial order, if any, is issued pursuant to Section 9-250 in order to resolve a Section 10-108 complaint. The carrier thereby retains its right to revise its competitive service tariffs, but does so subject to potential remedial action[28].

Because we hold that Sections 9-250 and 10-108 require the Commission to establish the forward-looking termination penalties for ValueLink services, even though Ameritech has revised its ValueLink tariffs, there is no reason to grant the Motion in order to consider the propriety of the revised termination penalties. The Commission will establish proper termination charges pursuant to our statutory remedial powers, and those charges will supercede Ameritech's revised charges[29].

IX. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Association of Communications Enterprises, f/k/a Telecommunications Resellers Association, is a national association of telecommunication resellers engaged in fostering and promoting telecommunications resale and protecting and furthering the interests of entities providing such services;

(2) Ameritech is an Illinois corporation that owns or controls for public use in Illinois, property or equipment for the provision of telecommunications services in Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Act;

(3) the Commission has jurisdiction of the parties hereto and the subject matter hereof;

(4) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

[28] The Commission need not determine now how long the Section 9-250 "remedial" tariff must remain in effect before the carrier can revise it again pursuant to Section 13-505. However, any subsequent revisions would have to comport with the requirements and principles set forth in the order mandating the remedial tariff.

[29] The Commission notes that it is unlikely that Ameritech could establish that its superceding ValueLink termination charges are just and reasonable under the principles announced in this Order. Apparently, the revised termination charges represent an arbitrary 50 percent reduction of the charges contained in the superceded ValueLink tariffs. This Order requires instead a return of the discount received by the customer prior to termination.

(5) Ameritech imposes termination charges, quantified as the minimum revenue requirement remaining after termination occurs, in connection with the following tariffed calling plans: ValueLink; ValueLink Extra; ValueLink Extra Select; ValueLink Illinois – Option F; ValueLink Illinois – Option F Preferred; Enhanced Ameritech ValueLink Plus; CompleteLink; and Straight Rate;

(6) the termination charges included in each of the tariffed calling plans described in Finding (5) are not state or local statutes, regulations or other legal requirements and, therefore, do not contravene subsection 253(a) of the Federal Telecommunications Act of 1996;

(7) the termination charges included in each of the tariffed calling plans described in Finding (5) are anti-competitive within the meaning of 220 ILCS 5/13-514;

(8) the termination charges included in each of the tariffed calling plans described in Finding (5) are unjust and unreasonable within the meaning of 220 ILCS 5/9-250;

(9) Ameritech should revise the tariffed calling plans described in Finding (5) to provide for termination charges calculated by subtracting the discounted charges the customer actually incurred during its term of service from the charges the customer should have incurred, based on its actual term of service, under the pertinent tariffed calling plan; further, Ameritech should be prohibited from including earned discounts, as described in this Order, in such termination charges; and further, Ameritech should be prohibited from including in such termination charges any unearned discounts associated with ValueLink services provided more than 12 months before service termination;

(10) calculation of a termination charge, pursuant to the formula described in Finding (9), should be performed by Ameritech upon termination of service by the customer or upon oral or written request from a customer, whichever occurs first; when such calculation is requested by a customer, it should be performed, and its results communicated to the customer, within three business days; the customer should be permitted to designate a telecommunications services provider as an agent for the purpose of requesting and receiving such calculation; in the event of a dispute with respect to such calculation, the burden of proving the correctness of the calculation should lie with Ameritech;

(11) when Ameritech's wins back a customer who is receiving one of the tariffed services described in Finding (5) from another telecommunications services provider, Ameritech's retail business unit

should so notify Ameritech's wholesale business unit and the relevant CLEC; in no event can Ameritech collect termination charges from the CLEC after winback;

(12) Ameritech's offer, to refrain from imposing on a customer termination charges concerning the tariffed services described in Finding (5) when Ameritech cannot produce a written service agreement signed by that customer or its agent and when that customer expressly states that it or its agent did not authorize service, should be approved and made mandatory by this Order;

(13) Ameritech's Motion to Reopen Record filed in this proceeding should be denied;

(14) ASCENT is not entitled under 220 ILCS 5/13-516 to an award of its attorneys' fees and litigation costs in this proceeding;

(15) Staff should gather sufficient information to support general conclusions regarding CLEC termination charges, and should assess that information in light of the principles set forth in this Order, and should render an opinion concerning the need for Commission action, and should identify what action, if any, would be appropriate; in such analysis, Staff should consider whether CLECs can and should be subject to different requirements than the historic incumbent local exchange providers; Staff should submit its report to the Commission within 90 days of the date of this Order;

(16) any objections, motions of petitions filed in this proceeding that remain undisposed of should be disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS THEREFORE ORDERED that within 30 days of the date of this Order, Ameritech shall revise the tariffs for the services described in Finding (5) to incorporate the termination charges described in Finding (9).

IT IS FURTHER ORDERED that after the date of this Order, Ameritech shall not impose any termination charges in any existing service agreement pertaining to the tariffed services described in Finding (5) other than the termination charges described in Finding (9).

IT IS FURTHER ORDERED that after the date of this Order Ameritech shall adhere to the requirements, procedures and policies set forth in Findings (10), (11) and (12).

IT IS FURTHER ORDERED that the Staff of the Commission shall gather sufficient information to support general conclusions regarding CLEC termination charges, and shall assess that information in light of the principles set forth in this Order, and shall render an opinion concerning the need for Commission action, and shall identify what action, if any, would be appropriate; in such analysis, Staff shall consider whether CLECs can and should be subject to different requirements than the historic incumbent local exchange providers; Staff shall submit its report to the Commission within 90 days of the date of this Order.

IT IS FURTHER ORDERED that any objections, motions of petitions filed in this proceeding that remain undisposed of are hereby disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS FURTHER ORDERED that, subject to the to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 3rd day of January, 2002.

Chairman